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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 168.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, AND EUGENE C. HILL, BY HIS GUARDIAN AD LITEM, EBEN SMITH.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 13, 1902.
CERTIORARI AND RETURN FILED MARCH 23, 1903.

(18,746.)

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Mandate.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable the Judges of the Circuit Court of the [Seal] United States for the District of Washington, Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Ninth Circuit, in a cause between The Mutual Life Insurance Company of New York, plaintiff in error, and George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maud Hill, in her own behalf, defendants in error, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on the 2d day of October, A. D. 1899, is in the following words, viz.:

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Washington, Northern Division, and was argued by counsel;

"On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed with costs."

As by the inspection of the transcript of the record of the said United States Circuit Court of Appeals, which was brought unto the Supreme Court of the United States by virtue of a writ of certiorari agreeably to the act of

Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-nine, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals, and the judgment of the Circuit Court of the United States for the District of Washington in this cause be, and the same are hereby, reversed with costs; and that the said plaintiff in error, The Mutual Life Insurance Company of New York, recover against the said defendants in error one hundred and twenty-nine dollars and thirty-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the Circuit Court of the United States for the District of Washington, with directions to overrule the demurrer to defendant's answer.

May 28, 1900.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari. notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the fourth day of June,

in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Costs of Plaintiff in Error.

Clerk	$ 61.35
Printing Record	48.00
Attorney	20.00
	$129.35

[Endorsed]: Mandate. Filed in the United States Circuit Court, District of Washington, October 12, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

October 12, 1900.

General Order Book, Circuit Court, volume 6, page 405.

GEORGE E. HILL et al.

vs. No. 511.

THE MUTUAL LIFE INS. CO. OF NEW YORK.

Order to File and Record Mandate.

Now, on this day, upon motion of Struve, Allen, Hughes & McMicken, it is ordered by the Court that the mandate in the above-entitled cause be filed and spread at large upon the records of this court.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, EBEN SMITH and ELIZA MAUDE HILL, in Her Own Behalf,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Amended Complaint.

Come now the above-named plaintiffs, by their attorneys, and for a cause of action against the above-named defendant, complain and allege:

First.

That the above-named plaintiffs, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill are each of them under the age of twenty-one years.

Second.

That on the 7th day of April, 1888, at Seattle, territory of Washington, now State of Washington, the above-named Eben Smith was duly appointed by the District Court of the then territory of Washington, now State of Washington, district guardian of the property and person

of George E. Hill, Ellen Kellogg Hill and Eugene C. Hill, and thereupon said Eben Smith qualified as such guardian, and he has ever since been and now is the duly appointed, qualified, and acting guardian of the property and persons of George E. Hill, Ellen Kellogg Hill and Eugene C. Hill.

Third.

That said George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, Eliza Maude Hill, and Eben Smith are each and all of them, and during all the times herein have been, residents, citizens, and inhabitants of the State of Washington.

Fourth.

That the defendant, The Mutual Life Insurance Company, is a corporation duly organized, acting, and existing and under and by virtue of the laws of the State of New York, with its principal office and place of business in the city of New York, State of New York.

Fifth.

That on or about the 29th day of April, 1886, said defendant, in consideration of the sum of eight hundred and fourteen dollars ($814) to it in hand paid by one George Dana Hill, made, executed, and delivered in the city of New York, State of New York, a certain contract or policy of insurance hereinafter set forth, whereby it insured the life of said George Dana Hill in the sum of twenty thousand dollars ($20,000). That said defendant in said contract agreed to pay Ellen Kellogg Hill, if living, and if not living, then to such of the children of their bodies

(the bodies of said George D. and Ellen Kellogg Hill), as shall be living at the death of said Ellen Kellogg Hill, or their guardian for their use, upon acceptance of satisfactory proof of the death of said George Dana Hill, the full sum of twenty thousand dollars ($20,000). That said contract or policy of insurance is in words and figures as follows, to wit:

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

No. 281, 470 A.

Age 46 years. Amount $20,000.

In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill of Seattle, in the county of King, Washington territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife or to their guardian, for their use, twenty thousand dollars ($20,000), upon acceptance of satisfactory proofs at its said office, of the death of the said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements, and benefits stated on the back of this policy which are hereby referred to and made part hereof:

The annual premium of eight hundred and fourteen dollars ($814.00), shall be paid in advance on the delivery of this policy, and thereafter to the company at its home

office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the twenty-ninth day of April, A. D. one thousand eight hundred and eighty-six.

RICHARD A. McCURDY,
President.

W. J. EASTON,
Secretary.

PROVISIONS, REQUIREMENTS, AND BENEFITS.

Payment of Premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract, shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided.

Dividends.—This policy is issued on the five-year distribution plan. It will be credited with its distributive

share of surplus, apportioned at the expiration of each five years from the date of issue. Only policies in force at the end of such terms, and entitled thereto by year of issue shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any other time. All surplus so apportioned may be applied at the end of such periods to purchase additional insurance, or in payment of future premiums on this policy, if requested in writing, or may then be drawn in cash.

Paid-up Policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter issue a paid-up policy, payable as herein provided, for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

Surrender.—This policy may be surrendered to the company at the end of the fifth year from the date of issue, and eighty per cent of the reserve computed by the American table of mortality, and four and one-half per cent interest, and the surplus as defined above will be paid therefor. If surrendered at the end of the second, or of any subsequent five-year period, the full reserve by the same standard and the surplus as defined will be paid. No cash value will be paid for a surrender at any other time or date.

NOTICE.

Powers of Agents.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to

bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

Assignments.—The company declines to notice any assignment of this policy until the original or a duplicate or a certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

That the first annual premium of eight hundred and fourteen dollars ($814) was paid to said defendant company on the delivery thereof to said George Dana Hill, by said George Dana Hill.

Sixth.

That the application referred to is not in the hands of plaintiffs, but is in the hands and possession of defendant, and plaintiffs cannot set forth a copy thereof, but plaintiffs allege that said application contained the following agreement and words: "And it is agreed that there shall be no contract of insurance until a policy shall have been delivered and issued by said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application; and that if said policy be issued the declarations, agreements, and warranties herein contained shall be a part hereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York."

Seventh.

Said Ellen Kellogg Hill mentioned in said contract above set forth died February 14, 1887, in the city of Seattle, territory of Washington, now State of Washington. Said Ellen Kellogg Hill died prior to said George Dana Hill.

Eighth.

Said George Dana Hill, insured, died on the 4th day of December, 1890.

Ninth.

Said Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill were children of the bodies of said Ellen Kellogg Hill and George Dana Hill, and were living at the time of the death of said Ellen Kellogg Hill.

Tenth.

Said Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill were the only children of the bodies of said Ellen Kellogg Hill and George Dana Hill at the time of the death of said Ellen Kellogg Hill.

Eleventh.

That on the 23d day of December, 1890, the defendant was notified of the death of said George Dana Hill, and requested to furnish plaintiffs necessary blanks in order that plaintiffs might furnish proofs of death as required by the rules and regulations of defendant company.

Twelfth.

That on the 3d day of February, 1891, said defendant, in reply thereto, informed and declared to said plaintiffs

that said contract or policy of insurance above set forth had been forfeited by the nonpayment of a premium.

That said defendant thereby waived the right to claim any other or any proofs of the death of said George Dana Hill.

Thirteenth.

That said George Dana Hill, during his lifetime and the plaintiffs', at all times duly performed all the conditions of said contract necessary by him to be performed.

Fourteenth.

That the defendant has wholly failed to pay to plaintiffs said policy of insurance or said sum of twenty thousand dollars ($20,000), or any part thereof.

Wherefore, plaintiffs pray for judgment against said defendant in the sum of twenty thousand dollars ($20,000) with interest thereon at the rate of six per cent per annum from the 3d day of January, 1891, together with costs and disbursements in this action.

SMITH & LITTELL,
STANTON WARBURTON,
Attorneys for Plaintiffs.

State of Washington, }
County of King. } ss.

Eben Smith, being first duly sworn, on oath deposes and says: That he is the Eben Smith above named as one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that he believes the same to be true.

EBEN SMITH.

Subscribed and sworn to before me this 19th day of October, 1895.

THOMAS T. LITTELL,

Notary Public, Residing at Seattle, King County, State of Washington.

[Endorsed]: Amended Complaint. Filed October 19, 1895. In the United States Circuit Court. A Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Dirision.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, EBEN SMITH, and ELIZA MAUD HILL, in Her Own Behalf,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANNCE COMPANY of New York,
Defendants.
} No. 511.

Amended Answer to Amended Complaint.

Comes now the above-named defendant, with the leave of Court first obtained, and makes amended answer to the amended complaint herein as follows:

I.

For answer to paragraph I of said amended complaint, defendant denies that the said Eliza Maude Hill is under

the age of twenty-one years or under the age of twenty-seven years; denies that said George E. Hill is under the age of twenty-one years or under the age of twenty-three years; denies that said Ellen Kellogg Hill is under the age of nineteen years; denies that said Eugene C. Hill is under the age of seventeen years.

II.

For answer to paragraph II of said complaint admits that said Eben Smith was appointed and qualified as the guardian of the personal property of said George E. Hill and Ellen Kellogg Hill and Eugene C. Hill, and continued to act as the guardian of said persons during their minority, but as to whether the said Eben Smith continues as the guardian of the persons and property of any of said persons after they had attained the age of twenty-one years, this defendant denies that it has any knowledge or information sufficient to form a belief.

III.

For answer to paragraph V of said amended complaint, the defendant, Mutual Life Insurance Company, a corporation, denies so much of said paragraph as alleges that this defendant made or delivered the said contract therein mentioned in the city or State of New York, or at any place other or outside of the State of Washington; denies that the consideration of said contract was other than is stated in said contract, and denies that the said alleged consideration of eight hundred and fourteen dollars was paid by the said George Dana Hill or anyone on his behalf to this defendant at any other place than in the

city of Seattle and territory (now State) of Washington; but avers that the said premium of eight hundred and fourteen dollars was paid by the said George Dana Hill to this defendant in the city of Seattle, and that at the same time and place the said policy of insurance was by defendant delivered to said Hill and became a contract.

IV.

For answer to paragraph XI of said amended complaint, defendant denies the same and each and every allegation therein contained.

V.

For answer to paragraph XII of said amended complaint, defendant admits that on or about the 3d day of February, 1891, it informed and declared to said plaintiffs that the said contract or policy of insurance had been lapsed and terminated by nonpayment of premium, but denies each and every other allegation in said paragraph contained.

VI.

For answer to paragraph XIII of said amended complaint, defendant denies that the said George Dana Hill during his lifetime duly or at all performed all or any of the conditions of the said contract necessary or required by him to be performed, or conditioned or mentioned in said contract of insurance to be performed by him; denies that the said George Dana Hill on the 29th day of April, A. D. 1887, or at any other time, ever paid or caused to be paid any part of the annual premium of eight hundred and fourteen dollars by the terms of said policy to be

paid by him, and denies that the said annual premium of eight hundred and fourteen dollars falling due on said 29th day of April, 1887, or any part of it, ever was paid by the said George Dana Hill or anyone on his behalf, or at all, either during the lifetime of said George Dana Hill or since his death, and denies that any annual payment of premium or part of premium mentioned in said contract or policy of insurance ever has been paid, save and except the first annual premium paid upon the delivery of said policy in the year 1886.

By way of a first and affirmative answer and defense to the said amended complaint, defendant alleges as follows:

I.

That the defendant, Mutual Life Insurance Company of New York, was at all the times mentioned in the amended complaint and at all the times herein mentioned, and is, a corporation duly chartered and created by the legislature of the State of New York, and existing under and by virtue of the laws of the said State, and is and was at all of said times engaged in transacting a life insurance business in the territory (now State) of Washington, under and by virtue of and in pursuance of the laws of the territory (now State) of Washington, with its principal office for the transaction of business in said State and territory at the city of Seattle.

II.

That on or about the 28th day of April, A. D. 1886, one George Dana Hill, being the same George Dana Hill named in the amended complaint, and who was at all the

times herein mentioned a citizen and resident of the territory (now State) of Washington, made, signed and delivered to the defendant at its office in said city of Seattle, territory of Washington, his written application to this defendant for a policy of life insurance upon his life in the sum of twenty thousand dollars which application became and was pursuant to its own terms a part of said policy and of the contract of insurance evidenced thereby.

III.

That the said application contains, among other things, a stipulation and condition to the following effect:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by the said company and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in said application."

IV.

That thereupon the agent of defendant in Seattle aforesaid transmitted said application of the said George Dana Hill to the agent of the defendant in San Francisco, by whom said application was transmitted to the defendant in the city and State of New York.

V.

That thereafter, to wit, on the 29th day of April, 1886, the defendant, pursuant to said application, transmitted the policy of insurance described in said amended complaint to its said agent at San Francisco, California, and thereafter, to wit, on the 10th day of May, 1886, the agent of the defendant at San Francisco aforesaid transmitted

the said policy of insurance to the agent of the defendant in Seattle aforesaid for delivery of the same to the said George Dana Hill provided the said George Dana Hill should pay to the defendant at Seattle the premium due upon said policy, and said last-named agent of the defendant in Seattle aforesaid on or about the 15th day of May, 1886, delivered the said policy to the said George Dana Hill and the said George Dana Hill at the said time and place paid to defendant the first premium due upon said policy.

VI.

That it was provided in said policy of insurance mentioned in said amended complaint, as a condition thereof, as follows:

"The annual premium of eight hundred and fourteen dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the 29th day of April, in every year during the continuance of this contract."

And it was therein further provided as a condition of said contract, as follows to wit:

"Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy and any further notice required by any statute is thereby expressly waived That part of the year's premium, if any, which is not due

and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

VII.

That pursuant to the conditions of the said policy there became and was due to the defendant as a premium upon the said policy of insurance upon the 29th day of April, A. D. 1887, the sum of eight hundred and fourteen dollars, and the said George Dana Hill and the said Ellen Kellogg Hill, his wife, and each and all of the plaintiffs herein failed, neglected, and refused to pay to the defendant at the time aforesaid the said sum of eight hundred and fourteen dollars, or any part thereof, and ever since said time and up to the time of the death of the said George Dana Hill, on the 4th day of December, 1890, the said George Dana Hill and the said Ellen Kellogg Hill, his wife, during her lifetime, and each and all of the plaintiffs failed, neglected, and refused to pay to defendant the said sum or any part thereof, or any other sum or thing of value whatsoever, and by reason thereof the said policy of insurance lapsed and terminated and became void and of no effect.

By way of a second and further affirmative answer and defense to the amended complaint, defendant alleges as follows:

I.

That the defendant, Mutual Life Insurance Company of New York, was at all the times mentioned in the

amended complaint and at all the times herein mentioned, and is, a corporation duly chartered and created by the legislature of the State of New York and existing under and by virtue of the laws of said State, and is and was at all of said times engaged in transacting a life insurance business in the territory (now State) of Washington, under and by virtue of and in pursuanec of the laws of the territory (now State) of Washington, with its principal office for the transaction of business in said State and territory at the city of Seattle.

II.

That on or about the 28th day of April, A. D. 1886, one George Dana Hill, being the same George Dana Hill named in the amended complaint, and who was at all times herein mentioned a citizen and resident of the territory (now State) of Washington, made, signed and delivered to the defendant at its office in said city of Seattle, territory of Washington, his written application to this defendant for a policy of life insurance upon his life in the sum of twenty thousand dollars, which application became and was pursuant to its own terms, a part of said policy and of the contract of insurance evidenced thereby.

III.

That said application contains, among other things, a stipulation and condition to the following effect:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by the said company, and the first premium thereon paid while the person proposed for insurance is

in the same condition of health described in said application."

IV.

That pursuance of said application defendant made its policy of insurance, being that in the amended complaint mentioned, and at Seattle, Washington, in exchange for payment of said premium of eight hundred and fourteen dollars, there delivered the said policy of insurance to the said George Dana Hill.

V.

That it was provided in said policy of insurance mentioned in said amended complaint as a condition thereof, as follows:

"The annual premium of eight hundred and fourteen dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the 29th day of April, in every year during the continuance of this contract."

And it was therein further provided as a condition of said contract as follows, to wit:

"Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived. That part of the year's premium, if any, which is

not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

VI.

That pursuant to the conditions of said policy there became and was due to defendant as a premium upon said policy of insurance on the 29th day of April, 1887, the sum of eight hundred and fourteen dollars. That the said George Dana Hill defaulted in the payment of said premium and the whole thereof and continued in said default during his lifetime and wholly neglected, omitted and failed to pay said premium and every part thereof; that on account of the said neglect and failure and default of said George Dana Hill, and in pursuance of the terms of said policy, this defendant, shortly after the said 29th day of April, 1887, entered the said policy upon its books as lapsed and terminated, and at all times subsequent to said April 29th, 1886, treated the said contract as lapsed, terminated and void; that at no time subsequent to the said 29th day of April, 1887, did the said George Dana Hill or anyone on his behalf apply to this defendant, or in any manner ask or seek to have said policy restored, but, on the contrary, at all times acquiesced in the said lapsing and termination of the said contract, as the same was entered and treated by this defendant, and at no time did he, the said George Dana Hill or anyone on his behalf, or on behalf of his said wife, or on behalf of any of said plaintiffs, ever offer to pay any premium on said policy

subsequent to the first annual premium for the year 1886 paid as aforesaid upon the delivery thereof, and that nothing whatever during the lifetime of the said George Dana Hill was paid or offered to be paid to defendant upon said contract or policy of insurance subsequent to said first annual premium, and by reason of the said premises the said George Dana Hill wholly abandoned the said contract.

And by way of a further third affirmative answer and defense to the matters in the amended complaint set forth, defendant alleges:

I.

That at all the times hereinafter mentioned it was and is a corporation duly chartered and created by the legislature of the State of New York as a mutual life insurance society, association, or corporation, and during all of said times has been and is engaged in the business of a mutual life insurance society or association. That the membership of said corporation consists of its holders of policies of life insurance; that the funds out of which and by means of which its business as such life insurance society or association is conducted and out of which damages and losses are to be paid, arise out of the earnings in its business as such mutual life insurance society or association and the premiums due upon the policies of life insurance issued by it, and at the times herein mentioned, under and by virtue of and in pursuance of the laws of the territory (now State) of Washington, it has been engaged in transacting its life insurance business in the said territory (now State), having its principal

office for the transaction of business in said State at the city of Seattle therein.

II.

That on or about the 28th day of April, 1886, one George Dana Hill, being the same George Dana Hill mentioned in the amended complaint and who was at all the times herein mentioned a citizen and resident of the territory (now State) of Washington, signed and delivered at defendant's office in Seattle aforesaid, his written application to defendant for a policy of life insurance upon his life in the sum of twenty thousand dollars, which application was a part of the policy hereinafter mentioned and the contract of insurance evidenced thereby.

III.

That the said application contained among other things a stipulation and condition to the following effect:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by the said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in said application."

IV.

That thereafter and about the 15th day of May, 1886, defendant upon the said application made its said policy of insurance upon the life of the said George Dana Hill and on said day, at Seattle, Washington, upon the payment to the said defendant by said George Dana Hill of eight hundred and fourteen dollars at said Seattle, there delivered to

said George Dana Hill a policy of insurance upon his life in the sum of twenty thousand dollars, being the policy in the amended complaint mentioned, and the said George Dana Hill thereby became a member of the said mutual life insurance society or association of this defendant.

V.

That it was provided in said policy of insurance as a condition thereof as follows:

"The annual premium of eight hundred and fourteen dollars shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the City of New York, on the 29th day of April, in every year during the continuance of this contract."

And it was therein further provided as a condition of said contract, as follows, to wit:

"Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy and any further notice required by any statute is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided."

VI.

That pursuant to the conditions of the said policy there became and was due to the defendant as a premium upon said policy of insurance on the 29th day of April, A. D. 1887, the sum of eight hundred and fourteen dollars, and the said George Dana Hill and the said Ellen Kellogg Hill, his wife, and each and all of the plaintiffs herein neglected, failed and refused to pay to the defendant at the time aforesaid said sum of eight hundred and fourteen dollars or any part thereof, and have ever since that time continued so to neglect, fail and refuse to pay the same and every part thereof, and did, up to the date of the death of the said George Dana Hill on the 4th day of December, 1890, continue to fail, neglect, and refuse to pay the said premium, or any part thereof, or any premium or any part of any premium subsequently to become due upon said policy, and have never paid or offered to pay any premium, or any part of any premium upon said policy of insurance, save and except the first annual payment for the year 1886; that during all of said times this defendant had insured the lives of many persons and had outstanding large numbers of policies, and during all of said times its membership consisted of many thousand persons, whose lives were insured by this defendant in various sums of money, and that during all of said times, for the purpose of successfully carrying on its said business of mutual life insurance and meeting its liabilities and discharging its duties to its members, it became and was necessary for every member of said association to make payment of his or her premiums,

and also to make payment of the same as they respectively fell due, and that by reason of the said neglect, failure, and refusal of the said George Dana Hill and his said wife, Ellen Hill, and the said plaintiffs to make payment of the premiums upon the said policy as the same became due, the said policy became lapsed, terminated and void, and the said plaintiffs and each of them are by reason of the said premises estopped from claiming the said policy is an existing contract, and from claiming any right of recovery thereon by reason of the death of George Dana Hill.

By way of a fourth affirmative defense to the matters in the amended complaint pleaded, defendant alleges:

I.

That at a time more than one year from the time of the issuance of the policy mentioned in the complaint, and more than one year from the said 29th day of April, 1886, and during the lifetime of the said George Dana Hill mentioned in the amended complaint, it was mutually agreed between the defendant and the said George Dana Hill that the said contract of insurance should be waived, abandoned, and rescinded and the said George Dana Hill and this defendant then and there by mutual consent waived, abandoned, and rescinded the said policy or contract of insurance accordingly and all their rights and obligations therein and thereunder.

By way of a further and fifth affirmative defense to the matters in the amended complaint pleaded, defendant alleges:

I.

That it was a corporation chartered and created by the legislature of the State of New York as a mutual life insurance association or society, and during such times was and is engaged in the mutual life insurance business, among other places in the State of Washington, and has complied with the laws of said State respecting foreign corporations transacting business therein, and during all the times herein mentioned had an office and principal place for transacting business in the city of Seattle in the territory (now State) of Washington.

II.

That on the 28th day of April, A. D. 1886, one George Dana Hill, being the same George Dana Hill named in the amended complaint, who was at all the times herein mentioned a citizen and resident of the territory (now State) of Washington, made, signed and delivered to the defendant at its office in Seattle aforesaid, his written application to defendant for a policy of life insurance upon his life in the sum of twenty thousand dollars, which application became and was, pursuant to its terms and the terms of the policy of insurance hereinafter mentioned, a part of said policy and of the contract evidenced thereby.

III.

That said application contained among other things a stipulation and condition to the following effect:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered

by the said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in said application."

IV.

That in pursuance of said application this defendant made its policy of life insurance, being the one in the amended complaint mentioned, and caused the same to be transmitted to said city of Seattle, and there, on or about the 15th day of May, 1886, through its agent at said Seattle, received from said George Dana Hill the first premium of eight hundred and fourteen dollars upon said policy and then and there delivered the said policy to said George Dana Hill, which then and there for the first time became an existing contract between said Hill and this defendant.

V.

That during all the times subsequent to the date of said policy and down to the death of said George Dana Hill which occurred December 4th, 1890, the said George Dana Hill was a citizen of said territory and State of Washington, and during all of said times was a resident of said city of Seattle in said territory and State and not elsewhere, and during all of said times the only postoffice address of the said George Dana Hill known to this defendant was at said city of Seattle in said territory (now State) of Washington.

VI.

That on the 29th day of April, 1887, in writing, and also personally, through its agent at Seattle, defendant

notified and informed the said George Dana Hill that the said premium of eight hundred and fourteen dollars necessary to be paid on said policy for a continuance thereof, was due and payable, and the defendant demanded the payment of said premium in said sum, and at said time and place, to wit, at said Seattle, tendered the receipt of this defendant therefor, duly signed by its president and secretary, and the said Hill being so fully advised and informed in the premises refused to make payment of the said premium or any part of it, and then and there intending for the purpose of inducing defendant to rely upon his said refusal, informed defendant that he, the said George Dana Hill, was unable to pay said premium, and did not intend to make payment thereof or of any premium thereafter to accrue on said policy of insurance, but, on the contrary, intended to allow the said policy to lapse and become terminated and void for want of payment of said premium or any future premium accruing on said policy, and the said defendant then and there, and ever since, relying upon the said representations and conduct of the said George Dana Hill, was thereby induced to and did declare the said policy terminated and abandoned, and in good faith relying upon the said conduct and representations upon the part of the said George Dana Hill, this defendant was induced to and did fail and abstain from giving or mailing or attempting to mail or give any further notice or demand whatsoever upon the said Hill for payment of premium upon the said policy, and did fail and abstain from giving any notice to any of said plaintiffs on account thereof, or to any

person interested in the said policy concerning the payment of any premium thereon.

By way of a further and sixth affirmative defense to the matters in the amended complaint pleaded, defendant alleges:

I.

That at all the times hereinafter mentioned it was and is a corporation chartered and created by the legislature of the State of New York as a mutual life insurance association or society, and during such times has been and is engaged in the business of a mutual life insurance society or association. That the membership of said corporation consists of its holders of policies of life insurance, making payment of the premiums on their respective policies, at the times therein stipulated and provided, and that the funds out of which and by means of which the business of said society or association is chiefly conducted and out of which its liabilities and losses are to be paid, arise from the earnings in its business as such mutual life insurance society or association, and the premiums due upon the policies of life insurance issued by it.

II.

That on the 31st day of December in each and every year it heretofore has and does ascertain the amount of its liabilities, and that such liabilities depend upon the policies issued by defendant in force; that defendant makes such ascertainment of liabilities and makes statements thereof to its policy holders for their information,

benefit and protection. That the liabilities of defendant depend upon its policies in force, and upon which premiums are paid. That neither the said George Dana Hill nor anyone on his behalf ever paid the premium of eight hundred and fourteen dollars or any part of said premium upon the policy in the amended complaint pleaded, falling due April 29th, 1887, and that by reason of the failure, neglect and default in making payment of said premium or any part thereof, this defendant caused the said policy to be entered upon its records as lapsed and terminated, and did not include the said policy as a liability in its ascertainment and statement to its policy holders, and never since said time has included or reported said policy as among its liabilities; that the policy holders meeting the conditions of their respective policies in the payment of premiums as they fall due, have at all such times acted upon the faith of said statement of liabilities, and persons becoming members of defendant and taking policies since the 29th day of April, 1887, have also been requested to and have relied upon the correctness of such statement of liabilities, and all said persons so acting have been induced to and have believed the said Hill policy lapsed and terminated as above stated, and that the same has not since the 29th day of April, 1887, and does not constitute a liability of defendant. That nothing whatever was or ever has been paid or offered to be paid by any person whomsoever or at all, on account of said policy, save and except the first annual premium of eight hundred and fourteen dollars paid upon the delivery thereof at Seattle, Washington, in 1886; that the

larger portion of said sum was absorbed and expended in the payment of fees and commissions of agents, examiners and office expenses pertaining to the obtaining and issuing of said policy; that said eight hundred and fourteen dollars purchased one year's insurance upon the life of said George Dana Hill, which expired April 29th, 1887, and that there never was in fact or in equity any balance or credit by way of surplus, accretion, reserve or otherwise due or owing upon said policy or to the said insured or any of said plaintiffs; and defendant alleges that to allow recovery on said policy which has not contributed in any manner to the reserve fund of defendant to meet its liabilities, tends to the disorganization and destruction of defendant's insurance business, and is inequitable to all of defendant's policy holders, and by reason of said premises plaintiffs should be estopped from any recovery in this action.

Wherefore defendant asks judgment that it be dismissed with its costs.

EDWARD LYMAN SHORT,
R. C. STRUDWICK,
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

United States of America,
District of Washington, } ss.
County of King.

Sherwood Gillespy, being first duly sworn on oath says: That he is the general agent for the State of Washington of the defendant in the above-entitled action, authorized

by it to solicit insurance in said State, and that he makes this affidavit in verification of the foregoing answer on behalf of said defendant; that he has read said answer, knows the contents thereof and believes the same to be true.

SHERWOOD GILLESPY.

Subscribed and sworn to before me this eighth day of June, 1901.

[Notarial Seal.] H. J. RAMSEY,

Notary Public in and for the State of Washington, Residing at Seattle, Washington.

Copy of within amended answer received and due service of same acknowledged this 8th day of June, 1901.

S. WARBURTON,

Attorney for Plaintiffs.

[Endorsed]: Amended Answer to Amended Complaint. Filed in the United States Circuit Court, District of Washington. September 4, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian EBEN SMITH, and ELIZA MAUDE HILL, in her Own Behalf,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Replication.

Come now the above-named plaintiffs, and in reply to the allegations contained in the affirmative matter in the answer of the defendant:

I.

In reply to the allegations contained in paragraph one of defendant's first affirmative defense, plaintiffs admit that the defendant is a corporation duly created and chartered by the legislature of the State of New York, and during all of said time has been and is engaged in the business of life insurance. Plaintiffs admit that said defendant has been engaged in transacting life insurance business in the State of Washington, but denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph one not herein admitted.

II.

Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the fourth and fifth paragraphs of said first affirmative defense.

III.

As to the allegations contained in paragraph seven of defendant's first affirmative defense, plaintiffs admit that they did not pay defendant any premium on said policy subsequent to the first annual premium, but deny that they neglected or refused to pay any premium or part of any premium subsequent to the first; on the contrary, plaintiffs allege that no request was ever made by said defendant of any one or all of said plaintiffs to pay any premium or part of premium subsequent to the first; that said defendant never notified any one or all of said plaintiffs that any premium or part of a premium on said policy subsequent to the first was due or unpaid. Plaintiffs further allege that if any premum on said policy was unpaid subsequent to the first that no one of them was aware of that fact. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph, except as above admitted.

REPLY TO SECOND AFFIRMATIVE DEFENSE.

I.

In reply to the allegations contained in paragraph one of defendant's second affirmative defense, plaintiffs admit that defendant is a corporation chartered and created by

the legislature of the State of New York as a life insurance company. Denies that it has any knowledge or information sufficient to form a belief as to any of the other allegations in said paragraph one contained.

II.

In reply to the allegations contained in paragraph four of the second affirmative defense, plaintiffs deny that said premium of eight hundred and fourteen dollars was paid on delivery of said policy, but are informed and allege and believe that said premium was paid to the agent of said defendant at the time and concurrent with the delivery of the application for said policy of insurance, and that defendant had the same in its possession when it accepted the application and issued its policy in the city of New York.

III.

In reply to the allegations contained in paragraph six of defendant's affirmative defense, plaintiffs admit that they did not pay to said defendant any premium on said policy subsequent to the first annual premium, but deny that they neglected or refused to pay any premium or part of any premium subsequent to the first; on the contrary, plaintiffs allege that no request was ever made by said defendant of any one or all of the said plaintiffs to pay any premium or part of premium subsequent to the first; that said defendant never notified any one or all of said plantiffs that any premium or part of a premium on said policy subsequent to the first was due or unpaid. Plaintiffs further allege that if any premium on said

policy was unpaid subsequent to the first, that no one of them was aware of that fact. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph except as in this paragraph admitted. Plaintiffs further allege in reply to said paragraph that said policy of insurance never became lapsed or forfeited during the life of said George Dana Hill.

REPLY TO THIRD AFFIRMATIVE DEFENSE.

I.

In reply to the allegations contained in paragraph one of defendant's third affirmative defense, plaintiffs admit that the defendant is a corporation duly created and chartered by the legislature of the State of New York and during all of said time has been and is engaged in the business of life insurance. Plaintiffs admit that said defendant has been engaged in transacting life insurance business in the State of Washington, but denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph one not in this paragraph admitted.

II.

In reply to the allegations contained in paragraph four of defendant's third affirmative defense, plaintiffs admit that defendant, on or about the 15th day of May, 1886, made, executed and delivered to said George Dana Hill its policy of insurance in the sum of twenty thousand dollars for the benefit of his wife in case she survived said George Dana Hill, and if not, then for the benefit of the children

of George Dana Hill and Ellen Kellogg Hill, his wife. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations in said paragraph not in this paragraph admitted.

III.

As to the allegations contained in paragraph six of defendant's third affirmative defense, plaintiffs admit that they did not pay the said defendant any premium on said policy subsequent to the first annual premium, but deny that they neglected or refused to pay any premium or part of premium subsequent to the first; on the contrary, plaintiffs allege that no request was ever made by said defendant of any one or all of said plaintiffs to pay any premium or part of a premium subsequent to the first; that said defendant never notified any one or all of said plaintiffs that any premium or part of a premium on said policy subsequent to the first was due or unpaid. Plaintiffs further allege that if a premium on said policy was unpaid subsequent to the first, that no one of them was aware of that fact. Plaintiffs deny that said policy of insurance became lapsed, terminated and void and deny that said plaintiffs are estopped from claiming that said policy is an existing contract and deny that they are estopped from claiming any right of recovery on said policy by reason of the death of said George Dana Hill. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to each and all of the allegations contained in said paragraph not in this paragraph specifically admitted or denied.

REPLY TO FOURTH AFFIRMATIVE DEFENSE.

Plaintiffs deny each and every allegation contained in said fourth affirmative defense.

REPLY TO FIFTH AFFIRMATIVE DEFENSE.

I.

In reply to the allegations contained in paragraph one of defendant's fifth affirmative defense, plaintiffs admit that defendant is a corporation chartered and created by the legislature of the State of New York as a life insurance company. Denies that it has any knowledge or information sufficient to form a belief as to any of the other allegations in said paragraph one contained.

II.

In reply to the allegations contained in paragraph four of said fifth affirmative defense, plaintiffs admit that said policy of insurance was delivered on or about the 15th day of May, 1886, and that a premium of eight hundred and fourteen dollars had been paid on said policy of insurance as a first premium. Plaintiffs are informed and believe and allege that said premium of eight hundred and fourteen dollars was paid at the time and concurrent with the application for said policy of insurance, and was in the possession of the defendant at the time it accepted said application of insurance before it executed its policy of insurance in pursuance to said application.

III.

In reply to the allegations contained in paragraph six of defendant's fifth affirmative defense, plaintiffs admit that they did not pay to said defendant any premium on

said policy subsequent to the first annual premium, but deny that they neglected or refused to pay any premium or part of any premium subsequent to the first; on the contrary, plaintiffs allege that no request was ever made by said defendant of any one or all of said plaintiffs to pay any premium or part of premium subsequent to the first; that said defendant never notified any one or all of said plaintiffs that any premium or part of a premium on said policy subsequent to the first was due and unpaid. Plaintiffs further allege that if any premium on said policy was unpaid subsequent to the first, that no one of them was aware of that fact. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph except as this paragraph admitted.

IN REPLY TO THE SIXTH AFFIRMATIVE DEFENSE.

I.

In reply to the allegations contained in paragraph one of defendant's sixth affirmative defense, plaintiffs admit that the defendant is a corporation chartered and created by the legislature of the State of New York for the purpose of engaging in the life insurance business. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph not in this paragraph admitted.

II.

In reply to the allegations contained in paragraph two of defendant's sixth affirmative defense, plaintiffs admit

that they did not pay to said defendant any premium on said policy subsequent to the first annual premium, but deny that they neglected or refused to pay any premium or part of premium subsequent to the first; on the contrary, plaintiffs allege that no request was ever made by said defendant of any one or all of said plaintiffs to pay any premium or part of premium or part of premium subsequent to the first; that said defendant never notified any one or all of said plaintiffs that any premium or part of a premium on said policy subsequent to the first was due or unpaid. Plaintiffs further allege that if any premium on said policy was unpaid subsequent to the first, that no one of them was aware of that fact. Plaintiffs deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph except as in this paragraph admitted.

For a further reply to the allegations contained in said paragraph two, plaintiffs allege that said defendant ought to be and is estopped from alleging or claiming that it entered on its said books the policy herein sued upon as forfeited and terminated, contrary to the fact, as well known to said defendant. Said defendant is estopped from claiming as a defense that it misstated to its policy holders that the policy herein sued upon was forfeited when it was not forfeited, of which fact the company was fully aware; that said defendant is estopped from alleging or claiming that it is used up and consumed the whole of the first annual premium of this life policy in extravagant salaries to its officers, in excessive com-

missions to its agents and other useless expenses incurred in securing new business, all contrary to the statute of New York and contrary to its agreement with each of its policy holders; that the actual costs of carrying a policy in the sum of twenty thousand dollars on the life of George Dana Hill for one year at his age of the life at the time of the issuance of said policy of insurance did not exceed two hundred dollars.

AFFIRMATIVE REPLY.

By way of affirmative reply to the matters and allegations contained in the first, second, third, fourth, fifth and sixth affirmative defenses of defendants and to each of them separately, plaintiffs allege as follows:

I.

That the said policy of insurance mentioned in plaintiffs' complaint was applied for by Ellen Kellogg Hill, wife of George Dana Hill, insured, for her own use and benefit, provided she should be living at the time of the death of her husband the said George Dana Hill, and if not, and in the event of her death prior to that of George Dana Hill, then for the use and benefit of the children of the bodies of said George Dana Hill and Ellen Kellogg Hill; that said Ellen Kellogg Hill had property in her own right and her own separate estate sufficient to meet the annual premiums as they became due on said policy; that the said plaintiffs and each of them, subsequent to the death of their mother, the said Ellen Kellogg Hill, had property in their own right, and were ready, willing, and able at all times mentioned in the complaint to pay

any and all premiums that might become due on said policy had they known of the existence thereof; that no legal demand or demand of any character or description was ever made on said Ellen Kellogg Hill during her lifetime for any premium on said policy of insurance subsequent to the first; that no legal demand or demand of any character or description was ever made on any of the plaintiffs herein, upon any of the children of the said Ellen Kellogg Hill, or upon their guardian, Eben Smith, for the payment of any premium subsequent to the first annual premium nor was any notice of any character or description ever given to said Ellen Kellogg Hill or to the said plaintiffs or any of the children of said Ellen Kellogg Hill and George Dana Hill that any premium was due or that any premium on said policy was unpaid; that the said plaintiffs and each of them, the said children of the bodies of said George Dana Hill and Ellen Kellogg Hill, and each of them, were unaware (if such is the case and which is not admitted) that the premiums or any part of the premiums subsequent to the first annual premium were not paid until subsequent to the death of said George Dana Hill, and until they notified the said defendant of the death of said George Dana Hill, and until the said defendant stated and claimed to the plaintiffs subsequent to the death of said George Dana Hill that the policy was forfeited and void and denied all liability on said policy.

II.

That plaintiffs further allege that the said George Dana Hill never was notified of the coming due of any

premium subsequent to the first, and that if said premium was not paid when due, the policy and all payments thereon would become forfeited and void, or that any premium was past due subsequent to the first, and that if said premium was not paid, the policy and all *premiums paid* thereon would be forfeited and void in conformity to and as required by the notice law of New York.

Wherefore plaintiffs demand judgment as set forth in the prayer of the complaint.

S. WARBURTON,
EBEN SMITH,
Attorneys for Plaintiffs.

State of Washington, }
County of Pierce. } ss.

Eben Smith, being first duly sworn on his oath, says that he is one of the plaintiffs herein, that he has read the foregoing reply and knows the contents thereof, and believes the same to be true.

EBEN SMITH.

Subscribed and sworn to before me this 21st day of August, 1901.

[Notarial Seal] E. P. MORAN,
Notary Public, Residing at Seattle, Washington.

We hereby admit due personal service on us of within replication by true and correct copy of the same on this 21st day of August, A. D. 1901.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

[Endorsed]: Replication. Filed in the United States Circuit Court, District of Washington, August 21, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

GEORGE E. HILL et al.,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Motion for Leave of Parties to Prosecute in Their Own Right.

Now come the plaintiffs and move the Court that an order be made joining as plaintiffs herein George E. Hill and Ellen Kellogg Hill, in their own right, and that their names be substituted as plaintiffs in their own right in the amended complaint on file herein, instead of their being represented by their guardian, Eben Smith.

This motion is based upon the application and affidavit of said plaintiffs filed herewith.

S. WARBURTON,
HAROLD PRESTON,
Attorneys for Plaintiffs.

[Endorsed]: Motion. Filed this 4th day of September, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

GEORGE E. HILL et al.,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Affidavit and Application of George E. Hill and Ellen Kellogg Hill.

United States of America,
State of Washington,
County of King.
ss

George E. Hill and Ellen Kellogg Hill, being first duly sworn, each deposes and says:

At the time the above-entitled action was commenced I was a minor, but have since arrived at the age of majority, and pray that I may be permitted to join in my own behalf as one of the plaintiffs in the prosecution of the above-entitled action.

ELLEN KELLOGG HILL.
GEORGE EDWARD HILL.

Subscribed and sworn to before me this 4th day of September, 1901.

[Notarial Seal] W. A. KEENE,
Notary Public in and for the State of Washington, Residing at the City of Seattle, in said State.

[Endorsed]: Affidavit and Application. Filed this 4th day of September, 1901. A. Reeves Ayes, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

GEORGE E. HILL et al.,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Order Granting Leave to Parties to Prosecute in Their Own Right.

Upon the application of the plaintiffs, it is ordered by the Court, the defendant consenting, that George E. Hill and Ellen Kellogg Hill be permitted to prosecute this action in their own right, in lieu of prosecuting it by their guardian, they having arrived at the age of majority subsequent to the commencement of the action, and that the complaint be deemed amended accordingly.

Done in open court this 4th day of September, A. D. 1901.

C. H. HANFORD,
Judge.

[Endorsed[: Order. Filed this 4th day of September, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

GEORGE E. HILL et al.,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Verdict.

We, the jury in the above-entitled action, do find for the plaintiffs, and assess their damages at the sum of twenty-nine thousand and twenty ($29,020.00) dollars.

L. A. DANIELS,
Foreman,

[Endorsed]: Verdict. Filed September 5, 1901. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, and ELIZA MAUD HILL, in Their Own Behalf, and EUGENE C. HILL, by His Guardian EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

No. 511.

Motion for New Trial.

Comes now the above-named defendant, within ten days after the rendition of the verdict in the above-entitled court and cause, and moves the Court to set aside said verdict and for a new trial, upon the following grounds:

1. That the amount of the recovery in said cause is excessive.

2. Error in the assessment of the amount of the recovery, because the verdict is too large.

3. Insufficiency of the evidence to justify the verdict, or any verdict whatever, in favor of plaintiffs or any of them.

4. Error in law occurring at the trial and excepted to at the time by defendant.

5. Because said verdict is contrary to the evidence in the case and contrary to law.

6. Because upon the law and evidence no verdict whatever should have been rendered for plaintiffs, but on the contrary a verdict should have been rendered in favor of the defendant.

This motion is based upon the minutes of the court, and the pleadings and proceedings on file in the clerk's office of said court.

R. C. STRUDWICK and
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

Copy of within motion for new trial received and due service of same acknowledged this 12th day of September, 1901.

S. WARBURTON and
HAROLD PRESTON.
Attorneys for Plaintiffs.

[Endorsed]: Motion for New Trial. Filed in the United States Circuit Court, District of Washington, September 12, 1901. A Reeves Ayres, Clerk. A. N. Moore, Deputy

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, ELIZA MAUD HILL and EUGENE C. HILL, By His Guardian, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Order Denying Motion for New Trial.

The matter of a motion for a new trial by the above-named defendant having come on for hearing, the respective parties being represented by their attorneys, the Court being fully advised in the premises, it is

Ordered that said motion for a new trial be, and the same is hereby, denied, to which order of the Court the defendant excepts and its exception is allowed.

C. H. HANFORD,

[Endorsed]: Order. Filed in the United States Circuit Court, District of Washington, November 1, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE HILL et al.,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Defendant's Motion for Judgment Notwithstanding Verdict.

Now comes the said defendant, The Mutual Life Insurance Company of New York, after the argument and submission of its motion to set aside the verdict in said cause heretofore rendered, and for a new trial thereof, and after the decision of the Court denying said motion, and moves the Court (notwithstanding the said verdict and notwithstanding the action of the Court in refusing to set the same aside and grant a new trial) for judgment in defendant's favor, dismissing plaintiffs' action.

STRUVE, ALLEN, HUGHES & McMICKEN,
EDWARD LYMAN SHORT,
R. C. STRUDWICK,
Attorneys for Defendant.

[Endorsed]: Defendant's Motion for Judgment Notwithstanding Verdict. Filed in the United States Circuit Court, District of Washington, November 1, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, EBEN SMITH, and ELIZA MAUD HILL, in Her Own Behalf,
Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

Opinion Filed January 23, 1902.

Action upon a life insurance policy issued to George Dana Hill, father of the plaintiffs; tried before the Court and a jury, resulting in a verdict in favor of the plaintiffs; heard on a motion for judgment in favor of the defendant non obstante veredicto. Motion denied.

STANTON WARBURTON, PRESTON, CARR & GILMAN, EBEN SMITH, for Plaintiffs.

STRUVE, ALLEN, HUGHES & McMICKEN, R. C. STRUDWICK, for Defendant.

HANFORD, District Judge.—Upon the facts alleged and admitted by the pleadings, a judgment in favor of the plaintiffs was rendered by this Court, which was affirmed by the Circuit Court of Appeals; thereupon the case was removed to the Supreme Court of the United States, by a

writ of certiorari, and by that Court the judgment was reversed and the case was certified back to this Court with a mandate for further proceedings in accordance with the opinion delivered by Mr. Justice Brewer. For a complete statement of the case reference is made to the decisions of the Supreme Court reported in 178 U. S. 347-350, and of the Circuit Court of Appeals for the Ninth Circuit, reported in 97 Fed. Rep. 263-270.

The ground upon which the decisions of the two lower courts was reversed is stated in the opinion of the Supreme Court, as follows:

"Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy and all rights and obligations on the part of the parties thereto.

"But it is said that the insured was not the beneficiary; his wife, and in case of her death, their children, being named as such; and that it was not in his power, by nonpayment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life insurance policy. If the answer in this case contained simply the allegation in respect to the insured's agreement with the company, we should be compelled to enter into an examination of that question; but it is alleged, not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife, and the plaintiffs, their children, 'failed, neglected and refused' to pay the premium. So we have a case in which not

only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life. The allegation in the answer does not disclose a mere omission, for it is 'neglected and refused,' and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge, or notice. The case, therefore, is one in which the beneficiaries refused to continue the policy, while the insured and the company abandoned it."

After being reinstated in this court, the case was brought to a trial and was submitted to a jury for decision of one issue only, which the Supreme Court of the United States held to be a material issue raised by the defendant's answer. The parties were permitted to introduce evidence relating to other facts which were not seriously disputed, for the purpose of developing the case fully and fairly, and to make a record which would enable the attorneys to argue the legal questions to their own satisfaction. The evidence bearing upon the material issue was all in favor of the plaintiffs and the jury rendered a verdict accordingly. The Court afterwards declined to hear arguments on a motion for a new trial, for the reason that a new trial would be a useless proceeding for if the plaintiffs are not entitled to a judgment upon the verdict, they can never prevail, and the law applicable to the conceded facts exonerates the defendant from any liability whatever under the policy sued upon. The defendant then interposed the motion now under considera-

tion, and upon that motion, counsel on both sides have argued the case, earnestly and elaborately, as if the decision of the Supreme Court had completely expunged the previous determinations of this Court and of the Circuit Court of Appeals, and returned the case here to be again considered with respect to the primary question whether the policy lapsed and was rightfully canceled by the defendant for nonpayment of the annual premiums which accrued in the lifetime of George Dana Hill.

In behalf of the plaintiffs it is alleged that by a stipulation in the contract, the parties have explicitly and conclusively determined that the contract was made at the defendant's home office in the State of New York, and as by its terms the contract is to be performed in New York, all questions as to the validity of every one of its provisions and as to the rights and liabilities of the parties under the contract, must be determined in accordance with the laws of the State of New York; that in form, the policy is not for a single term of one year with a right of renewal extending the insurance from year to year, but is a continuing policy subject to forfeiture and cancellation for nonpayment of annual premiums to become due as specified, therefore, the company had no power to cancel this policy, or claim a forfeiture, without complying with the statute of New York, which prescribes that a specified notice must be given in a manner specified, and for failure on the part of the company to give the statutory notice the premiums did not become due and there was no default.

Against this contention the defendant's attorneys have

argued with ingenuity and force, that the contract did not have vitality until the policy was delivered and the first annual premium paid in the State of Washington; that the policy contains an express declaration that the annual premiums are to become due on a specified date in each year, of which notice is given and accepted by the policy itself, and the right to any other notice expressly waived, and that in case of failure to make the payments to accrue as specified, the policy should lapse and the right of the insured under it should be absolutely terminated; that this stipulation is not contrary to any law in force in the State of Washington; that the laws peculiar to the State of New York cannot apply to this contract so as to affect its validity, or limit the rights or obligations of the parties under it, by force of the legislative power of the State of New York; that the statutes of New York may be considered as controlling the contract only so far as the parties by their own agreement have adopted the same, and the particular statute which the plaintiffs have invoked cannot be deemed to have been adopted by the parties contrary to their solemn agreement, although as to matters concerning which the contract is otherwise silent, the laws of the State of New York are made controlling. On the trial it as shown by uncontradicted evidence that a local collecting agent of the defendant company, presented to George Dana Hill, the company's official receipt for the second annual premium when it became due, and requested payment, and also held the receipt for a time and made several demands for payment, and afterwards time for payment was extended by special

direction of the Pacific Coast manager of the company, so as to give ample opportunity to keep the policy alive by payment of the premium, but notwithstanding the efforts to collect the premium, it never was paid, and upon the argument it was insisted that the company dealt only with George Dana Hill; that in all the transactions relating to the policy he represented the beneficiaries; that the company had the right to regard him as being fully authorized to act for the beneficiaries in the matter, and whether the failure to pay the premium was due to his inability to obtain the amount of money required, or any other cause, the mere fact of nonpayment under the circumstances constitutes neglect and refusal on the part of the plaintiffs to pay the premium as alleged by the defendant in the plea referred to in that part of the opinion of the Supreme Court above quoted.

After a great deal of deliberation, I feel constrained to hold that as the main questions above outlined were fully considered by this court and by the Circuit Court of Appeals, and decided in favor of the plaintiffs, and as the decisions of these questions are left undisturbed by the Supreme Court, they must now be regarded as the law of this case. A cluster of cases involving the same or kindred questions were brought before the Supreme Court by this defendant and argued by eminent lawyers in connection with this case, and it is fair to assume that all the different phases of the questions were pressed upon the attention of the court. (See The Mutual Life Ins. Co. Cases, 178 U. S. 327-353; Mutual Life Ins. Co. v. Cohen, 179 U. S. 262.) It appears that both questions did receive atten-

tion and there was a fair opportunity to decide them finally so as to terminate the litigation, if the decision sustained the defendant in either of its contentions, but the Supreme Court refrained from giving any instructions to the Court to which the case was remanded, unless an inference unfavorable to the defendant may be drawn from the fact that this case was distinguished from the Cohen case. If the lower courts erred in holding that this policy could not be canceled for nonpayment of premiums, without compliance on the part of the defendant with the New York statute, the special plea which contained the allegation that these plaintiffs failed, neglected and refused to pay the second premium is complete and sufficient to constitute a valid defense, without that allegation, and the particular matter which the Supreme Court adjudged to be a valid defense is superfluous, or else the preceding allegations as to the place where the contract was actually made, and as to nonpayment by the father of the plaintiffs, tendered only an immaterial issue, for if the statute of New York prescribing that a particular notice must be given and that any agreement contained in the policy waiving that prescribed notice shall be void, is not applicable, and if the stipulations contained in the policy and the laws in force in the State of Washington, are controlling, then the right of the company to cancel the policy became absolute when the time had passed for the payment of the second annual premium, and the refusal of these children to pay that premium after the policy was already dead, is very much like skinning a dead body, but could have no effect on the legal rights of

the parties. The opinion of the Supreme Court, and the references therein made to its decisions in the other cases, shows that it was adjudged by that court that an agreement by competent parties to abandon a policy of insurance would constitute a complete bar to any action upon the policy, and it was shown that the answer contained allegations amounting to a plea of express abandonment by agreement between the defendant and George Dana Hill, but instead of reversing the judgment for error in not giving effect to the plea of abandonment, by George Dana Hill, as it should have done if he was authorized to terminate the right of the plaintiffs, the Court intentionally refrained from expressing any opinion on the question as to the binding effect on the rights of the plaintiffs of his acts and omissions alleged in the answer. The opinion points out that the defendant by its answer raised an issue as to the intentional conduct of the plaintiffs themselves in refusing to pay the premium, distinct from the alleged agreement made by their father to abandon the policy, and it is obvious that the decision of the Supreme Court is hinged upon this issue as to the individual conduct of the plaintiffs themselves. That is made a material issue, and I think that it is the only issue which under the mandate from the Supreme Court was reopened for adjudication in this Court.

The motion must be denied.

C. H. HANFORD,

Judge.

[Endorsed]: Memorandum of Decision on Motion for Judgment non obstante veredicto. Filed January 23, 1902. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL by Their Guardian, EBEN SMITH, and ELIZA MAUD HILL, in Her Own Behalf,
Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

No. 511.

Stipulation Extending Time for Filing Bill of Exceptions.

It is stipulated between the parties hereto that the above-named defendant may have forty days from this date in which to prepare and file its bill of exceptions, and that the time provided by rule for preparing and filing the same be extended accordingly.

Dated at Seattle, Washington, January 28th, 1902.

PRESTON, CARR & GILMAN,
Attorneys for Plaintiffs.

STRUVE, ALLEN, HUGHES & McMICKEN, and R. C. STRUDWICK,
Attorneys for Defendant.

[Endorsed]: Stipulation. Filed in the United States Circuit Court, District of Washington. January 28, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL by Their Guardian, EBEN SMITH, and ELIZA MAUD HILL, in Her Own Behalf,
Plaintiffs,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 511.

Order Extending Time to File Bill of Exceptions.

Upon the stipulation of the parties hereto and with the consent of the court, it is ordered that the time for preparing and settling a bill of exceptions on the part of the above-named defendant in this case, be, and the same is hereby, extended forty days from and after the date of this order.

Dated at Seattle, January 28th, 1902.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed in the Circuit Court, District of Washington. January 28, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE HILL, by His Guardian, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Judgment.

The above cause having heretofore come on for trial in the above court on the 4th day of September, 1901, and the jury having been regularly empaneled, and the Court having heard the proofs and the allegations of the parties and Stanton Warburton, Harold Preston and Eben Smith having appeared for the plaintiffs, and Messrs. Struve, Allen, Hughes & McMicken, and R. C. Strudwick, having appeared for the defendant, and the case having been submitted to the jury upon the instructions of the Court and the allegations of the parties, and the jury having retired to consider the evidence under the instructions of the Court, and having returned a verdict in open court in favor of the plaintiffs and against the defendant on the 6th day of September, 1901, in the

sum of $29,020, and the defendant having filed and served its motion for a new trial and the same having been argued and considered by the court and overruled, and exception to the ruling of the Court duly allowed, and the motion of said defendant for judgment notwithstanding the said verdict having been argued by counsel of the respective parties and having been duly considered was overruled, and exception was duly allowed; now upon the application of the plaintiffs for judgment upon said verdict:

It is ordered, considered, and adjudged that the plaintiffs, Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene Hill, do have and recover of and from the defendant, The Mutual Life Insurance Company of New the sum of $29,020.00, together with the sum of $677.13 interest from the 6th day of September, 1901, together with their costs and disbursements in this action taxed at $———, said sum to draw interest from this date at the rate of six per cent per annum. To the rendering of the foregoing judgment said defendant excepts and its exception is allowed.

January 30, 1902.

C. H. HANFORD,
Judge.

[Endorsed]: Judgment. Filed in the United States Circuit Court, District of Washington. January 30, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Bill of Exceptions.

Be it remembered, this cause came on regularly for trial the 4th day of September, 1901, before the Honorable C. H. Hanford, District Judge presiding; a jury was duly empaneled and sworn, plaintiffs appearing in person and by Messrs. Preston, Carr & Gilman, and S. Warburton, their counsel, and the defendants appearing by Messrs. Struve, Allen, Hughes & McMicken and R. C. Strudwick, Esq., the following proceedings were had and the following exceptions taken, to wit:

Exception No. 1.

Upon the conclusion of the testimony and prior to the argument of counsel to the jury and prior to the charge of the court to the jury, the defendant duly requested the Court to instruct the jury, upon the whole case, and upon

all the evidence in the case, to render a verdict in favor of the defendant, which instruction was refused by the Court; whereupon and while the jury was still at the bar, the defendant duly excepted to the refusal of the Court to give said instruction and its exception was duly allowed by the Court.

The following is all the evidence in the case and the grounds of said request for a verdict for defendant:

PLAINTIFF'S TESTIMONY.

The COURT.—I assume from your opening statement that you are not going to make any offer here to prove that the statutory notice was sent.

Mr. ALLEN.—No, sir.

The COURT.—I wanted to understand if that matter was eliminated from the case.

Mr. ALLEN.—As to the statutory notice, no notice that complies with the terms of the New York statute—we are not going to offer proof as to that.

Mr. WARBURTON.—We offer in evidence an application for the policy of life insurance. This goes in under stipulation.

Mr. ALLEN.—May it please the Court, we have a stipulation here, of which the application is a part. It provides certain things that would be a part of the case of this defendant, and certain things that are general in the case. The last sentence of the stipulation is a general stipulation for both parties. I think that part of the stipulation should go in with it.

Mr. WARBURTON.—I simply offer the application that is admitted to be the original application for the policy.

Mr. ALLEN.—I only ask him to put in so much of the stipulation as to show that this is the applicaton. It is only the last sentence and the others will all be withheld from the jury until I offer them.

The COURT.—You might as well read it all to the jury.

(Application marked Plaintiff's Exhibit "A" and stipulation attached thereto, read to the jury as follows:)

Defendant's Exhibit No. 1.

In the Circuit Court of the United States, District of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, EBEN SMITH, and ELIZA MAUD HILL, in Her Own Behalf,
Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

No. 511.

Stipulation as to the Testimony of Certain Witnesses on Behalf of Defendant.

To save the expense and inconvenience of issuing commissions, it is stipulated between the parties hereto that the following witnesses, to wit, William J. Easton, Isaac

F. Lloyd and Duer duP. Breck, residing in the city and State of New York, if produced upon the trial and sworn as witnesses on behalf of defendant, will testify as follows, and the said statement shall be admitted in evidence on behalf of defendant with like force and effect as the testimony of the witnesses respectively, as if present at the trial and duly sworn.

The said William J. Easton will testify that he is, and for several years past has been, the secretary of the defendant, Mutual Life Insurance Company, discharging the duties of that office.

That said Duer duP. Breck, now and for several years last past the corresponding secretary of said defendant, and the said Isaac F. Lloyd, now and for several years past one of the vice-presidents of said defendant, each will testify that as appears by the books and records of the defendant at its home office in the city and State of New York, application in writing for insurance upon the life of one George Dana Hill, signed by Ellen Kellogg Hill, by George D. Hill, the person to whom insurance is payable, and by George D. Hill, the person proposed for insurance, dated April 28, 1886, was made and that the original and genuine application, being the same mentioned in the amended complaint and amended answer, is attached to this stipulation and may be offered in evidence as such, by either of the parties to this action, and in pursuance of said application the policy of insurance mentioned in the pleadings was made and executed and transmitted for delivery to the Pacific Coast Agency of defendant; that some time afterwards, as appears by the

said books and records, the first annual premium payable upon the policy was received at the home office of the defendant; that the books and records of said defendant show no other premium payment than eight hundred and fourteen dollars, the amount of the first annual premium on the policy. That the books and the records in the home office at New York show that shortly after April 29th, 1887, the said policy was noted lapsed and forfeited for nonpayment of premium. That at all times from the date of the application until his death, the residence and postoffice address of George Dana Hill were at Seattle, Washington.

S. WARBURTON,
Attorney for Plaintiffs.

STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

The following appears on the face:

"Defendant's Exhibit No. 1. Filed in the U. S. Circuit Court, Dist. of Washington, Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Plaintiffs' Exhibit "A."

Copy of a Five Year Distribution Policy.

(Man's Life) LIFE PLAN, ANNUAL PREMIUMS.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Age, 40 years. **Amount, $10,000.**

Annual.

Premium.

$322.00.

In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay, at its home office in the city of New York, unto John Doe, of New York, in the county of New York, State of New York, his executors, administrators or assigns, ten thousand dollars, upon acceptance of satisfactory proofs at its said office, of the death of the said John Doe, during the continuance of this policy, upon the following condition; and subject to the provisions, requirements, and benefits stated on the back of this policy which are hereby referred to and made a part hereof.

The annual premium of three hundred and twenty-two dollars shall be paid in advance on the delivery of this policy and thereafter to the company at its home office in the city of New York, on the first day of September, in every year during the continuance of this contract.

In witness whereof the said, The Mutual Life Insurance Company of New York, has caused this policy to be signed by its president and secretary at its office in the city of

New York, the first day of September, A. D., one thousand eight hundred and eighty-five.

Signed,

RICHARD A. McCURDY, President.

Signed,

ISAAC F. LLOYD, Secretary.

(Here follow provisions identical with those contained in Plaintiff's Exhibit "B," pp. —— to —— hereof.)

Alphabetical APPLICATION. E. J. M.

Register 1-5-8-9

to

Declined 2-8

Ques. and ans. Gener.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK FOR A FIVE YEAR DISTRIBUTION POLICY.

Subject to the Charter of said Company, and the Laws of said State.

The following particulars form a part of the contract with the company:

1. A. Name of person proposed for insurance? (Give each name in full.)

   A. George Dana Hill.

   B. Residence? B. Town, Seattle; County, King; Territory, Wash.

   C. Postoffice address? C. Seattle, Washington Terry.

   Married or single? Married.

2. A. Amount of insurance? A. $20,000 (twenty thousand).

B. Kind of policy? B. Life.

C. Premium, how payable? C. Annual.

D. Age at nearest birthday? D. Forty-six years.

E. Place of birth? E. Sullivan, Ohio.

F. Date of birth? F. February 19th, 1840.

3. A. Name of person to whom insurance is payable at death? A. Ellen Kellogg Hill.

B. Residence? Seattle, W. T.

C. Relationship? C. Wife.

4. A. If a life policy for the benefit of the wife, shall it be paid to her children, to your children, or to the children of the two, if she be not living at its maturity? A. To the children of two.

B. If an endowment, to whom shall it be paid in case you survive the stipulated period? B. ————.

C. If an endowment to whom shall it be paid in case of the death of the beneficiary before the expiration of the period? C. ————.

5. A. Particular occupation or employment? A. U. S. A. officer, retired. —— County Treasurer, King Co., Wash. Ty.

B. Former occupation if recently changed. B. Not changed for several years.

C. Former residence if recently changed? C. Not changed for several years.

D. Have you any intention of changing your residence or occupation? If so, state your intention? D. No.

E. Do you agree not to reside or travel in any part

of the torrid zone, and not to engage in any specially hazardous occupation or employment during the next two years following the date of issue of the policy for which application was made without first obtaining permission from this company? E. I do.

Are you now insured in this company? No. Amt.

Give total amount. No. No Amt.

Give the number of each policy? No. Amt.

6. A. Are you insured in any other company? A. Yes.

B. Name of, and amount of insurance in each company? B. Pacific Mutual of California, $10,000.

* * * * * * * *

(The following declaration and agreement must be signed by the person in whose favor the policy is applied for and by the person whose life is proposed for insurance.)

It is hereby declared and warranted that all the statements and answers as above made are complete and true, and that they, together with this declaration and agreement, constitute an application to The Mutual Life Insurance Company of New York for a policy of insurance, and are offered as a consideration for the policy hereby applied for. And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations,

agreements, and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York. It is agreed that in any distribution of surplus, the principles and methods which may be adopted by the company for such distribution, and its determination of the amount equitably belonging to such policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under said policy. It is also agreed that prompt notice of the death of the insured shall be given to the company, and formal proofs thereof, in accordance with the rules of the company, shall be furnished within one year after the said death.

Dated at Seattle, Tery. of Wash., the twenty-eighth day of April, 1886.

Witness: E. A. TURNER.

Signature of the person to whom the insurance is payable:

ELLEN KELLOGG HILL.
By GEO. D. HILL.

Signature of the person proposed for insurance:

GEO. D. HILL.

(By mutual consent the medical examiner's report immaterial and omitted.)

SPECIAL NOTICE TO APPLICANTS AND POLICY HOLDERS.

1st. The following are the specially hazardous occupations or employments referred to in question 5, E. of the application:

Blasting, mining, submarine labor, aeronautic ascensions, arctic explorations, the manufacture of highly explosive substances, service upon any railroad train, or in switching, or in coupling cars, or on any steam or other vessel, or military or naval service in time of war.

2d. This company cannot entertain any proposition on the part of the husband to change the interest in a wife's policy while said policy is in force in her favor.

3d. The company does not agree to restore a policy after lapse for nonpayment of premiums; and when, in special cases, policies are restored, satisfactory evidence of the insurable condition of the party must be given.

4th. Policy holders must not expect to be notified when their premiums will be due. It is a practice of the company to send these notices, as reminders when the address is known, but no responsibility is asumed on the part of the company in consequence of their nonreception.

5th. In making inquiries, address the general agent through whom the policy was issued or the home office, and state the number of the policy as well as the name of the insured.

6th. The fact that the policy has additions to its credit give no authority to the company to apply them to the payment of premium without written directions from the party insured.

Application of George D. Hill.

No. of policy, 281,470.

Kind of policy, Life, D. P. Due.

Date of policy, 29 day of Ap'l, 1886.

Amt. of policy, $20,000.

Age of party, 46 years.

——— year ——— annual premium, $814.

——— Extra. "

_____

$_____

The above blank spaces are to be filled up only at the New York office.

To

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Richard A. McCurdy, President,

Nassau, Cedar, and Liberty Streets.

A. B. Forbes, General Agent,

San Francisco, Cal.,

Edition September, 1885.

The following is stamped on the back: "H. F. Heisterman & Co., Real Estate & Insurance Agts., April 30, 1886, Victoria, B. C."

Mr. WARBURTON.—Plaintiffs offer in evidence the policy of insurance.

(Paper referred to by counsel admitted in evidence, marked Plaintiffs' Exhibit "B," and read to the jury as follows:)

Plaintiffs' Exhibit "B."

"No. 281470. A.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Wife's Life.
Age 46 years.
Annual
Premium.
$814.

Five Year Distribution Policy.
Amount $20,000.

In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill, of Seattle, in the county of King, Washington Territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife, or to their guardian for their use, twenty thousand dollars; upon acceptance, if satisfactory proofs at its said office, of the death of the said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part thereof;

The annual premium of eight hundred and fourteen dollars and ——— cents shall be paid in advance on the delivery of this policy, and thereafter to the company at its home office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York the twenty-ninth day of April, A. D. one thousand eight hundred and eighty-six.

RICHARD A. McCURDY,
President.

W. J. EASTON,
Secretary.

PROVISIONS, REQUIREMENTS AND BENEFITS.

Payment of Premiums.—Each premium is due and payable at the home office of the company in the city of New York; but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided.

Dividends.—This policy is issued on the five year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of each five years from the date of issue. Only policies in force at the end of such terms, and entitled thereto by year of issue, shall share in such distribution of the surplus; and

no other distribution to such policies shall be made at any other time.

All surplus so apportioned may be applied at the end of such periods to purchase additional insurance, or in payment of future premiums on this policy, if requested in writing, or may then be drawn in cash.

Paid-up Policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a paid-up policy, payable as herein provided for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

Surrender.—This policy may be surrendered to the company at the end of the fifth year from the date of issue, and eighty per cent of the reserve computed by the American table of mortality and four and one-half per cent interest, and the surplus as defined above will be paid therefor. If surrendered at the end of the second or of any subsequent five year period the full reserve by the same standard and the surplus as defined will be paid. No cash value will be paid for a surrender at any other time or date.

NOTICE.

Powers of Agents.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

Assignments.—The company declines to notice any assignment of this policy until the original or a duplicate or certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

The following appears on the back:

FIVE YEAR DISTRIBUTION POLICY.

No. 281470. A.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

Insurance on the Life of George D. Hill.

Amount $20,000. Date April 29th, 1886.

Term of life ————.

Annual payment, $814. With Guarantee of Paid-up Policy.

Stamped on back: "H. F. Heisterman & Co. Real Estate, May 22, 1886. Insurance Agents, Victoria, B. C."

Mr. WARBURTON.—I offer in evidence papers that I have had marked for identification Plaintiffs' Exhibits "C" and "D" for identification.

Mr. ALLEN.—The genuineness of the papers I concede, but we object to their introduction as irrelevant, immaterial and incompetent.

The COURT.—Objection overruled and exception noted for the defendant.

(Papers marked Plaintiffs' Exhibits "C" and "D" and read to the jury as follows:)

Plaintiff's Exhibit "C."

EBEN SMITH, THOMAS T. LITTELL.
United States Master in Chancery.

LAW OFFICES OF SMITH & LITTELL,
Rooms 309 and 310 Butler Block,
Seattle, Washington, December 23d, '90.

To the Secretary of the Mutual Life Insurance Co., New York City, N. Y.

Dear Sir:—We are executors of the last will and testament of the late George Dana Hill, who lost his life on December 4th, by accident.

In looking among his papers, we find a policy of insurance No. 281,478, in your company, insuring the life of said Hill for the benefit of his wife, Ellen Kellogg Hill, for the sum of twenty thousand (20,000) dollars.

Will you please forward to us the necessary blanks in order that we may perfect and send forward to you at once proofs of Captain Hill's death, as required by the rules and regulations of your company. An early compliance with this request will be esteemed a personal favor.

Very truly yours,
EBEN SMITH,
DAVID KELLOGG,
Ex'rs.

(Testimony of Eben Smith.)

Plaintiff's Exhibit "D."

DEPARTMENT OF CORRESPONDENCE.
THE MUTUAL LIFE COMPANY OF NEW YORK.
Richard A. McCurdy, President.

New York, Feb. 3d, 1891.

Mr. Eben Smith, Seattle, Wash.

Dear Sir:—Your favor of the 23d of Dec., 1890, received. We beg to state that policy No. 281,478—G. D. Hill was forfeited for nonpayment of premium on April 30th, 1887.

Yours truly,

H. E. DUNCAN, JR.,
Corresponding Secretary.

Mr. PRESTON.—It is agreed between counsel that the policy referred to in these letters is the policy in suit.

EBEN SMITH, a witness called on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Q. (Mr. PRESTON.) You are the Eben Smith who is plaintiff in this cause as guardian of certain minor children of Geo. D. Hill, deceased? A. Yes, sir.

Q. When were you appointed guardian of these children?

A. Well, it was sometime after the death of Ellen K. Hill, the mother of these children. I could not give you the exact date, but she died in 1887, in February.

Q. Was there ever any other guardian appointed to these chidren before you?

A. No, sir, I was the only guardian that acted for these children, that is, appointed by the court.

(Testimony of Eben Smith.)

Q. You have since been their guardian?

A. Yes, sir.

Q. And are now? A. Yes, sir.

Q. Calling your attention to the policy of insurance, exhibit "B," which has been put in evidence in this case, I will ask you when you first heard of the existence of that policy?

A. After the death of George D. Hill, which occurred December 4th, 1890.

Q. Prior to that time had you any knowledge that there was a policy of insurance on his life in this company?

Mr. ALLEN.—I object as irrelevant and immaterial.

THE COURT.—Objection overruled, exception noted for the defendant. A. None whatever.

Q. During your guardianship of these children and prior to the death of Captain George D. Hill, was there any request ever made upon you by or on behalf of the defendant company to pay any premium on that policy?

Mr. ALLEN.—I object as irrelevant and immaterial.

A. No, sir, not a particle of instruction.

The COURT.—Objection overruled exception noted for defendant.

Q. Did you at any time prior to the death of George D. Hill have any knowledge of the nonpayment of any premium.

Mr. ALLEN.—I object as irrelevant and immaterial.

(Testimony of Eben Smith.)

The COURT.—Objection overruled, exception noted for the defendant.

A. No, sir, I did not. I would like to make one correction. I stated I was the only guardian appointed by the Court. That is corrrect, but after the death of George D. Hill I found that I was named testamentary guardian under his will.

Cross-Examination.

Q. (Mr. ALLEN.) You speak of being the only guardian of these children. Their father was alive and they were living with him, were they not, at the time of their mother's death in 1887? A. Yes, sir.

Q. They were inmates of the home of their father, were they not—he was the head of the family?

A. At that time, yes.

Q. And at the time that you were appointed guardian? A. Yes, sir; with this possible qualification. I think the eldest child was at Tacoma at the Seminary. I may not be entirely correct.

Q. But still, under his parental care?

A. Yes, sir, still under his parental care.

Q. Now, do you know how old these children were at that time? A. Well, I cannot give that.

Q. These children also continued under their father's parental care at the time of his death.

A. I so understood it.

Q. They were all residing here, that is, the home of Captain Hill was here in Seattle during all of that time?

A. Yes, sir.

(Testimony of witness closed.)

(Testimony of Mrs. Eliza Maud Bowman.)

Mrs. ELIZA MAUD BOWMAN, a witness called on behalf of the plaintiffs, being duly sworn, testified as follows:

Q. (Mr. PRESTON.) Are you one of the plaintiffs in this case? A. I am.

Q. George E. Hill and Ellen Kellogg Hill and Eugene C. Hill are your brothers and sisters are they not?

A. Yes, sir.

Q. Can you tell the Court the ages of each of these children?

Mr. ALLEN.—I object as irrelevant and immaterial. this is affirmatively set up in the answer.

Mr. WARBURTON.—I do not think the answer sets up the correct ages of these children.

The COURT.—Objection overruled, exception noted for the defendant.

Q. You may state, if you can, the age of George E. Hill?

A. Do you mean at the present time—24 years.

Q. When was he born? A. In 1877.

Q. What month? A. April.

Q. When was Ellen Kellogg Hill born, if you know?

A. 1883, August 26th.

Q. Eugene Carey?

A. In April—no he was born in 1883 and she was born in 1881—in August, 1881, is her age and April, 1883, is Carey's age.

(Testimony of Mrs. Eliza Maud Bowman.)

Q. When were you born? A. In 1873.

Q. What month? A. May.

Q. Mrs. Bowman, when did you first become aware of the existence of this policy?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

A. Two or three years after my father's death.

Q. Was there ever any demand or notice given you on behalf of the company of nonpayment of any premiums?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for defendant.

A. No, not that I remember of.

(Testimony of witness closed.)

GEORGE E. HILL, a witness being called on behalf of the plaintiffs being first duly sworn, testifies as follows:

Q. (Mr. WARBURTON.) Are you one of the plaintiffs in this case? A. I am.

Q. When did you first learn of the existence of the policy of insurance?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for defendant.

A. After father's death.

(Testimony of George E. Hill.)

Q. Were you ever aware of the nonpayment of premiums, if that is a fact, prior to his death, on this policy?

Mr. ALLEN.—I object as irrelevant and immaterial.

THE COURT.—Objection overruled, exception noted for defendant.

A. No, sir.

Q. Was there ever any demand or notice given you on behalf of the company, or anyone else, of nonpayment of any premium on this policy prior to your father's death?

Mr. ALLEN.—I object as irrelevant and immaterial.

THE COURT.—Objection overruled; exception noted for defendant. A. No, sir.

(Testimony of witness closed.)

ELLEN KELLOGG HILL, a witness called on behalf of the plaintiffs, being duly sworn, testifies as follows:

Q. (Mr. WARBURTON.) State your name.

A. Ellen Kellogg Hill.

Q. Are you one of the plaintiffs in this case?

A. I am.

Q. Miss Hill, when did you first become aware of the existence of the policy of insurance sued upon here.

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

A. Well, I am not sure what time, but it was not until

(Testimony of Ellen Kellogg Hill.)

it was put into the hands—until it was made a suit.

Q. You were not aware until after the suit?

A. No, not until after the suit was begun.

Q. Were you ever aware of the nonpayment of any premium prior to your father's death, if such be the case?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

A. No, sir, I never knew anything about the policy.

Q. No demand or notice was ever given to you of the nonpayment of the premium by the company or anyone else? A. No.

Mr. ALLEN.—We object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for defendant.

(Testimony of witness closed.)

EUGENE CAREY HILL, a witness called on behalf of the plaintiffs, being duly sworn, testifies as follows:

Q. (Mr. WARBURTON.) What is your name?

A. Eugene Carey Hill.

Q. Are you one of the plaintiffs in this case?

A. I am, through my guardian.

Q. When did you become aware of the existence of this policy?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

(Testimony of Eugene Carey Hill.)

A. I did not until after my father's death hear about it.

Q. Was there any notice or demand of any character or description for the payment of premium ever made upon you during your father's life?

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

A. None whatever.

Q. State whether you are aware, if such be the fact, of nonpayment of any premium prior to your father's death.

Mr. ALLEN.—I object as irrelevant and immaterial.

The COURT.—Objection overruled, exception noted for the defendant.

A. No, sir.

(Testimony of witness closed.)

Mr. WARBURTON.—We rest.

Mr. ALLEN.—May it please the Court at this we move the Court for a nonsuit as the case is made. (Argument by counsel.)

At this time a recess was taken until two o'clock P. M.

Afternoon Session.

Continuation of proceedings pursuant to adjournment.

The COURT.—I consider this to be a very close question and I am not disposed to grant this motion; and yet

I am not prepared to say just exactly what the ruling of the Court should be. I do not wish to be understood as committed at all in overruling this motion now. I will require the defendant to go on with its defense and this question will be further considered, if you choose to make a motion after all the evidence is in on an instruction or to consider it further after a verdict. The motion is denied.

Mr. ALLEN.—We will ask an exception.

The COURT.—Exception allowed.

DEFENDANT'S TESTIMONY.

Mr. ALLEN.—I will read the stipulation which was read in part by learned counsel on the other side.

Mr. PRESTON.—Mr. Allen is about to offer in evidence agreed facts as to the method pursued in the initiation of this contest.

Mr. ALLEN.—I propose to read the stipulation.

Mr. PRESTON.—I want to raise a question as to the materiality of the proof. It is his purpose, I presume, to read in evidence the agreed facts in regard to how it was this contract was initiated, and what procedure the parties, the agents and the applicant Hill, went through to secure the issuance of this policy, with a view of sustaining the defense interposed here, that the contract was made in this state. We wish to object to it on the ground that it is incompetent, irrelevant, and immaterial in view of the fact that the parties by the contract

have agreed that the contract of insurance was made in the state of New York. I desire to be heard for a few moments on this proposition. (Argument by counsel.)

The COURT.—The evidence, I think, is proper to show the surroundings and circumstances under which the contract was made. I will overrule the objection and allow an exception for the plaintiff.

(Stipulation offered by counsel marked as Defendant's Exhibit No. 1.)

Mr. ALLEN.—I next offer in evidence, may it please the Court, the certified articles or statutory charter with amendments of The Mutual Life Insurance Company, the defendant, and with it a certified copy of the appointment of statutory agents in the State of Washington. I will state that denial was made on knowledge and information as to whether the laws had been complied with in this respect.

(Charter of the company marked Defendant's Exhibit No. 2.)

(Appointment of the agents marked Defendant's Exhibit No. 3. The following is a copy of exhibits Nos. 2 and 3, and read to the jury:)

(It is stipulated that defendant filed copy of its charter and amendments to the same, duly certified and authenticated in the office of the Secretary of State of the State of Washington, in compliance with the laws relating to foreign corporations transacting business in said State, the same being exhibit No. 2 herein, and the following appointment of statutory agent, duly certified and authenticated, being exhibit No. 3 herein.)

Defendant's Exhibit No. 3.

Know All Men by These Presents:

That The Mutual Life Insurance Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its home office and principal place of business in the city of New York, in said State, but doing business in the State of Washington, does, pursuant to the provisions of section 14, chapter 82 of the Session Laws of the State of Washington for the year 1895, hereby make, constitute and appoint R. C. Strudwick, a citizen of the State of Washington and a resident of Seattle, in said state, its true and lawful attorney, and does hereby authorize R. C. Strudwick to make and accept service in any proceedings in any court in said State of Washington, or of the United States therein.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused its corporate seal to be hereto affixed, and these presents to be signed, executed, acknowledged, and delivered in its name and behalf by Robert A. Granniss, its vice-president, this 12th day of December, A. D. 1895.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

[Corporate Seal] By ROBERT A. GRANNISS,
Its Vice-President.

(Filed Dec. 26.)

The foregoing instrument was duly certified and authenticated. By mutual consent the certificates thereof are omitted.

Mr. ALLEN.—We desire, as the Court may not take notice of a special act of the legislature, to introduce in evidence the act incorporating The Mutual Life Insurance Company of New York, with its amendment. We have now produced in evidence a certified copy from the records of the Secretary of State of the State of Washington. If there is any question by counsel as to this being proper evidence for all purposes, I have a certified copy made by the Secretary of the State of New York under the seal of the State, a copy of the charter and the amendments, being chapter 246 and An Act to Incorporate the Mutual Life Insurance Company of New York, passed April 12th, 1840.

(Papers received without objection and marked Defendant's Exhibit No. 4, and read to the jury as follows:)

(It being agreed that all of said instruments are duly certified and authenticated, but that the certificates showing the same be omitted from this bill of exceptions.)

Defendant's Exhibit No. 4.

Chapter 246.

An Act to Incorporate the Mutual Life Insurance Company of New York.

Passed April 12, 1842, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly to enact as follows:

Section 1. William H. Aspinwall, James Brown, John W. Leavitt, Elihu Townsend, James S. Wadsworth, Philip S. Van Rensselaer, Gouverneur M. Wilkins, John V. L. Pruyn, Thomas W. Olcott, Charles L. Livingstone,

Joseph Blunt, Jacob P. Giraud, John C. Cruger, Alfred Pell, David C. Golden, Jacob Harvey, Robert B. Minturn, Mortimer Livingston, Rufus L. Lord, Arthur Bronson, Henry Brevoort, Theodore Sedgwick, Stacy B. Collins, Robert C. Cornell, James Boorman, James Campbell, William Moore, Morris Robinson, Zebedee Cook, Junior, Jonathan Miller, Fitz Green Hallock, John A. King, T. Romeyn Beck, Richard V. DeWitt, Gideon Hawley and James J. Ring, and all other persons who may hereafter associate with them in the manner hereinafter prescribed, shall be a body politic and corporate by the name of The Mutual Life Insurance Company of New York.

Section 2. In addition to the general powers and privileges of a corporation, as the same are declared by the third title of the eighteenth chapter of the first part of the Revised Statutes, the corporation hereby created shall have the power to insure their respective lives, and to make all and every insurance appertaining to or connected with the life risks and to grant and purchase annuities.

The real estate which it shall be lawful for the said corporation to purchase, hold and convey, shall be:

1st. Such as shall be requisite for its immediate accommodation in the convenient transaction of its business; or,

2d. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, or for money due; or

3d. Such as shall have been conveyed to it in satisfaction of debts, previously contracted in the course of its dealings; or

4th. Such as shall have been purchased at sales upon judgments, decrees or mortgages obtained or made for such debts.

The said corporation shall not purchase, hold or convey real estate in any other case or for any other purpose, and all such real estate as shall not be necessary for the accommodation of said company in the convenient transaction of its business, shall be sold and disposed of within six years after the said company shall have acquired title to the same, and it shall not be lawful for the said company to hold such real estate for a longer period than that above mentioned.

Section 3. All persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to the insured in the said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by said corporation and no longer.

Section 4. All the corporate powers of the said company shall be exercised by a board of trustees and such officers and agents as they may appoint. The board of trustees shall consist of thirty-six persons, all of whom must be citizens of this State. They shall elect a president annually, who shall be a member of this corporation and they shall have power to declare by by-law, what number of trustees less than a majority of the whole, but not less than nine, shall be a quorum for the transaction of business.

Section 5. The persons named in the first section of this act shall constitute the first board of trustees.

Section 6. The trustees shall, at their first meeting, divide themselves by lot, into four classes of nine each. The term of the first-class shall expire at the end of one year; the term of the second class shall expire at the end of two years, the term of the third class shall expire at the end of three years, the term of the fourth class shall expire at the end of four years, and so on successively each and every year. The seats of these classes shall be supplied by the members of this corporation, a plurality of votes constituting a choice but an insurance of at least one thousand dollars in amount shall be necessary to entitle any member to a vote. The section shall not be construed to prevent a trustee going out from being eligible to a re-election. The board of trustees may fill any vacancies in their number, occasioned by death, resignation, or removal from the State. The election of trustees shall be held on the first Monday of June in each year at such place in the city of New York as the board of trustees shall designate, of which they shall give at least fourteen days previous notice, in two of the public newspapers printed in the said city, and the board of trustees shall at the same time appoint three members of the said corporation inspectors to preside at such election; and if any of the said inspectors decline or fail to attend, the trustees may appoint others to fill such vacancies.

Section 7. Every person who shall become a member of this corporation, by effecting insurance therein, shall the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees, and no premium so paid shall

even be withdrawn from said company, except as hereinafter provided, but shall be liable to all the losses and expenses incurred by this company during the continuance of its charter.

Section 8. The trustees may determine the rates of insurance and the sum to be insured.

Section 9. It shall be lawful for the said corporation to invest the said premiums in the securities designated in the following sections, and to sell, transfer, and change the same, and reinvest the funds of said corporation when the trustees shall deem expedient.

Section 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following sections, shall be invested in bonds and mortgages on unincumbered real estate within the State of New York, the real property to secure such investment of capital shall in every case be worth twice the amount loaned thereon.

Section 11. The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States, or of this State, or of any incorporated city in this state.

Section 12. Suits at law may be maintained by said corporation against any of its members, for any cause relating to the business of said corporation; also suits at law may be prosecuted and maintained by any member against said corporation for losses by death, if payment is withheld more than three months after the company is duly notified of such losses; and no member of the corporation shall be debarred his testimony as witness in any

such cause, on account of his being a member of said company, and no member of the corporation not being in his individual capacity a party to such suit, shall be incompetent as a witness in any such cause on account of his being a member of said company.

Section 13. The officers of said company, at the expiration of five years from the time that the first policy shall have been issued, and bear date, and within thirty days thereafter, and during the first thirty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company in which they shall charge each member with a proportionate share of the losses and expenses of said company according to the original amount of the premium paid by him, but in no case to exceed the amount of the premium. Each member shall be credited with the amount of said premium, and also with an equal share of the profits of said company derived from investments and earnings in proportion to said amount; and in case of the death of any member of the said company, the amount standing to his credit at the last preceding striking of balance as aforesaid, together with the proportion which shall be found to belong to him at the next subsequent striking of said balance, shall be paid over to his legal representatives or assigns within three months after the said last-mentioned balance shall be struck. Any member of the company who would be entitled to share in the profits, who shall have omitted to pay any premium, or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of

the company, and all such previous payments made by him shall go to the benefit of the company.

Section 14. On some day in the first thirty days after the expiration of the first five years from the time when the said company shall issue their first policy, and within the first thirty days of every subsequent five years, the officers of the said company shall cause to be made a general balance statement of the affairs of the said company which shall be entered in a book prepared for that purpose, which shall be subject to the examination of any member of the company during the usual hours of business for the term of thirty days thereafter. Such statement shall contain:

1st. The amount of premiums received during the said period.

2d. The amount of expenses of the said company during the said period.

3d. The amount of losses incurred during the same period.

4th. The balance remaining with the said company.

5th. The nature of the security on which the same is invested or loaned, and the amount of cash on hand. The said company shall also make and transmit to the Comptroller of the State on the first day of January in each year, a full statement of its affairs in the same manner as moneyed corporations are required to do under the second title of the eighteenth chapter of the first part of the Revised Statutes. The books of the said company shall be open to the examination of any member thereof during the usual hours of business, in the same manner

as the books of the moneyed corporations are required by the Revised Statutes to be kept open for the inspection of the stockholders thereof.

Section 15. The sections of the Revised Statutes from nineteen to twenty-five, both inclusive, of the first article of the second title of the eighteenth chapter of the first part shall not be applicable to the corporation hereby created.

Section 16. The operations and business of the corporation shall be carried on at such place in the city of New York as the trustees shall direct.

Section 17. No policy shall be issued by said company until application shall be made for insurance in the aggregate of five hundred thousand dollars at least, and the trustees shall have the right to purchase for the benefit of the company all policies of insurance or other obligations issued by the company.

Section 18. The legislature may at any time alter or repeal this act.

Section 19. This act shall take effect immediately.

Chapter 60.

An Act to Amend the Act Entitled "An Act to Incorporate the Mutual Life Insurance Company of New York," Passed April 12, 1842.

Passed March 25, 1851.

The People of the State of New York Represented in Senate and Assembly do Enact as Follows:

Section 1. Section thirteen of the act entitled "An act to incorporate the Mutual Life Insurance Company of New York," passed April 12, 1842, is hereby amended, and shall hereafter read as follows, viz:

Section 13. The officers of said company at the expiration of five years from the time that the first policy shall have been issued and bear date, and within sixty days thereafter, and during the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company, and shall credit each member with an equitable share of the profits of the said company. And in case of the death of the party whose life is insured, the amount standing to his credit at the last preceding striking of balance, as aforesaid, shall be paid over to the person entitled to receive the same, and the proportion which shall be found to belong to him at the next striking of balance, shall be paid when the same shall be ascertained and declared. Any member of the company who would be entitled to share in the profits who shall have omitted to pay any premium or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of the company, and all such previous payments made by him shall go to the benefit of the company. No member except officers and agents thereof shall be personally liable for the losses of the company, and such officers and agents, severally, shall only be liable for the losses arising by reason of their own respective neglect or misconduct.

Chapter 131.

An Act in Relation to the Dividend of the Mutual Life Insurance Company of New York.

Passed April 2, 1862; three-fifths being present.

The People of the State of New York Represented in Senate and Assembly, do Enact as Follows:

Section 1. The Mutual Life Insurance Company of New York may appropriate its dividends either to the purchase of additional insurance payable with the policy, or at the option of the insured, in reduction of, or toward the annual payment of premiums on policy, such dividends may be declared every five years or oftener at the option of the said company, provided, that said company shall not make such appropriation in reduction of any annual premium without the consent first had and obtained of the superintendent of the insurance department, after each dividend, as to all persons entitled to such dividend.

Section 2. This act shall take effect immediat ·ly.

JAMES FORMAN, a witness called on behalf of the defendant, being first duly sworn, testifies as follows:

Q. (Mr. ALLEN.) Where do you reside?

A. Victoria.

Q. How long have you resided there?

A. Going on eleven years.

Q. State, if you please, what, if any, relation you hold to the defendant, The Mutual Life Insurance Company?

A. I am a partner in the firm of Heisterman & Company at Victoria.

Q. When did you go into the firm of Heisterman & Company? A. In 1896.

Q. How long have you been employed there?

A. Since April, 1891.

Q. In that office?

A. Yes, sir, previous to going into the firm.

(Testimony of James Forman.)

Q. And in what capacity were you employed?

A. Bookkeeper and accountant and confidential clerk. I had knowledge of everything that went on inside of the office of Heisterman & Company.

Q. Did you know H. F. Heisterman? A. I did.

Q. Who was the other partner?

A. George W. Haines.

Q. Is Mr. Heisterman living?

A. No, he died in August, 1896.

Q. Is Mr. Haines living?

A. Mr. Haines died in December, 1898, I believe, in 1897, or 1898—I would not be positive.

Q. You had, as confidential clerk and bookkeeper an opportunity of knowing of all the business of the firm?

A. Yes, sir.

Q. For eleven years?

A. Yes, sir, it is the date that I went into the office.

Q. Do you know the handwriting of Mr. Heisterman?

A. I do.

Q. You say they have been, during all this time you have spoken of, the agents of The Mutual Life Insurance at Victoria?

A. The firm has represented the company since 1873.

Q. Since 1873? A. Yes, sir, twenty-eight years.

Mr. ALLEN.—I will state, may it please your Honor, in introducing or offering to introduce certain letters, the originals are filed in the books of the various offices from which they come, all of which I have had compared copies made from the originals, and if the originals are ad-

(Testimony of James Forman.)

mitted I would like to withdraw them and substitute the compared copies so that we will not deplete the records of the offices from which they came, if that is agreeable to Court and counsel.

Mr. PRESTON.—There is no objection to that.

Q. I will place in your hands, Mr. Forman, a paper bearing date April 30th, 1886, with the signature H. F. Heisterman & Company, and ask you, if you please, to examine it. Do you recognize that paper?

A. I do.

Q. Do you recognize the signature to it?

A. Yes, sir; I have a copy of that letter in our letter-book. It is signed by Mr. Heisterman of Heisterman & Company.

Q. And it is his signature? A. Yes, sir.

Q. You know that?

A. I know that, I can positively swear to his signature.

Mr. ALLEN.—We offer this letter in evidence.

Mr. PRESTON.—I desire to make the same objection to this as I interposed to the last offer of evidence, and then the further ground that this is not the best evidence of the transaction set forth. This letter is from Heisterman & Company to Mr. Forbes in San Francisco, saying: "Herewith find application of George Dana Hill of Seattle for policy in suit."

Mr. ALLEN.—I have to have some order of proof. I shall follow this up by showing that Mr. Forbes is the

(Testimony of James Forman.)

general Pacific Coast agent, and that all the general conduct of the business is from his place on the coast. That it was all sent to his office and there was forwarded to the head office.

The COURT.—Objection overruled, exception noted for the plaintiff.

(Paper admitted in evidence and marked Defendant's Exhibit No. 5 and read to the jury as follows:)

Defendant's Exhibit No. 5.

Copy.

H. F. Heisterman & Co.,
Real Estate Agents,
Sehl's Block,
Government Street.

A. B. Forbes, Rec'd
May 4, 1886,
General Agent, S. F.

Victoria, B. C., April 30, 1886.

A. B. Forbes, Esq., San Francisco, Cal.

Dear Sir: Enclosed please find monthly collection and draft for $528.90 to balance the same. Miss McCandlish has gone to Europe and is not expected to return before June. Her brother has gone for her, and as we cannot collect we return the premium receipt. Mr. Black's D. receipt has not been returned to us yet we expect it tomorrow.

Herewith please find application from George Dana Hill of Seattle for $20,000. Life a pr. $814.

Yours very truly,
H. F. HEISTERMAN & CO.

(Testimony of James Forman.)

The endorsement on the back is as follows: "Defendant's Exhibit 5. Filed in the U. S. Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

I next hand the witness a letter of date May 29, 1886, signed H. F. Heisterman & Company, and ask the witness to state if he recognizes that letter.

A. This was written by Mr. Heisterman.

Q. The same as the former letter? A. Yes, sir.

Mr. ALLEN.—I now offer this letter in evidence.

Mr PRESTON.—We object to that, if your Honor please, on the ground that it is incompetent, irrelevant, and immaterial. I meant to call your Honor's attention also to the fact that the only thing that this would be offered to prove would be the nonpayment of the $814, the first premium, until some time after. We think it is not good evidence of the fact to introduce a letter written by one agent of the defendant company to another stating the fact, it is hearsay.

The COURT.—What is the purpose of that letter, Mr. Allen?

Mr. ALLEN.—It shows, may it please your Honor, the reception of the money out here along with the other letters after the receipt of the policy out here.

The COURT.—Objection overruled, exception noted for the plaintiff.

(Paper marked Defendant's Exhibit No. 6 and read to the jury as follows:)

(Testimony of James Forman.)

Defendant's Exhibit No. 6.

Copy.

(P. O. Drawer 4.)

H. F. Heisterman & Co.,

Real Estate Agents,

Sehl's Block.

Government Street.

Victoria, B. C., May 29, 1886.

A. B. Forbes, Esq., San Francisco, Cal.

Dear Sir: Your several favors 20th inst. duly received In regard to new policy 281,470, Hill Prem. $814—we expect the money over on Monday or Tuesday as we learn that the insured was not prepared to pay till 1st June.

We send you herewith Draft on San Francisco for $724.45 to balance May collections in full.

Shaw's renewal receipt was mailed overland to you on 27 inst. and ought to reach prior to this letter. We were put to considerable trouble in vain to find the party who last time paid in New Westminster. At same time we sent proper voucher for Edgar Marvin policy 170,475. Marvin says he won't be able to fix that policy till Mr. Jackson's return from England.

Thanks for pamphlets Liberality & security & best Company which will come in usefully.

We expect to have a No. 5,000 appl. for this mail if the Doctor makes examination in time—otherwise first steamer overland.

(Testimony of James Forman.)

How will it be abt our deferred 10 per cent on Turner's new policies? The premiums due us thereon amt to $47.97. We allowed him 30 per cent in order to get him to push business. Shall we charge our Com.? Or how do you advise settlement?

Yours very truly,

H. F. HEISTERMAN & CO.

The following endorsement appears on the back: "Defendant's Exhibit 6. Filed in the U. S. Circuit Court, Dist. of Washington, Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. I now offer you for examination a letter of June 15th, 1886, signed by H. F. Heisterman & Company and ask you if you recognize that.

A. I do; it is signed by Mr. Heisterman.

Q. That is Mr. Heisterman's handwriting, is it?

A. Yes, sir.

Mr. ALLEN.—I now offer this letter in evidence.

Mr. PRESTON.—We object for the reason stated in our last objection.

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Paper marked Defendant's Exhibit No. 7 and read to the jury as follows:)

(Testimony of witness closed.)

(Testimony of James Forman.)

Defendant's Exhibit No. 7.

Copy.

H. F. Heisterman & Co.,

Real Estate Agents,

Government Street.

A. B. Forbes,

Jun. 21, 1886.

General Agent, S. F.

Victoria, B. C., June 15th, 1886.

A. B. Forbes, Esq., San Francisco, Cal.

Dear Sir: Your valued favor 8th inst. duly received and contents have our careful attention. Do you desire our 3 Rate Books, 1885—returned? The rates are the same with some additional information as to reture premium rates & Estimated Results. The 20 Rates books you advise have not yet come to hand.

Enclosed we have much pleasure to hand herewith application of Walter Herbert Finlaison for $2000, 15 y Endowm paid in 10 years prem. ½ a $93.20. Dividends every 5 years with liberty to draw the same then.

Enclosed please find draft on Wells for $447.—being Capt. Hill's premium paid E. A. Turner on 12 inst. Turner writes "had I pressed payment and delivery of policy I might have had one of those ghastly cases of "not taken" to report now the captain has got it. He has got $814. invested and he'll keep it."

(Testimony of James Forman.)

Mr. Turner neglected to send Dr. Minor's voucher for $5.—have written him to send it direct on to you if not forwarded here meantime.

Policy 281,470 Geo. D. Hill paid 12 June 86, $814.

Dr. Minor	$ 5.	
Exch. from Seattle	2.80	
40 per cent com. thereon	325.60	
Exch. on S. F. on bt. ¾	3.60	
Draft to balance	477.	$814

We would like to have a couple more Agents rate books one for Mr. Haynes and one for Mr. Quilline. The latter will visit S. F. likely the next steamer and then call upon you.

Yours truly,

H. F. HEISTERMAN & CO.

The following endorsement appears on the back: "Filed in the U. S. Circuit Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

HOWARD H. LEWIS, a witness called on behalf of the defendant, being duly sworn, testifies as follows:

Q. (Mr. ALLEN.) Mr. Lewis where were you living in the spring of 1887? A. Seattle.

Q. In what business were you engaged at that time?

A. In the real estate and insurance business.

Q. What insurance company were you acting for?

A. For The Mutual Life Insurance Company of New York, among others.

(Testimony of Howard H. Lewis.)

Q. That is the defendant in this case.

A. I take it to be, yes.

Q. Were you in that capacity associated with anyone, and if so, whom.

A. I was associated with Mr. E. A. Turner, he was my partner.

Q. At what times were you associated with Mr. Turner as the agent of the defendant, that is, at Seattle?

A. Our partnership commenced sometime in the fall of 1886 and continued through the winter of 1888 and 1889, somewheres in the neighborhood of two years.

Q. Mr. Turner had been the agent before that?

A. Yes, sir.

Q. Do you know whether Mr. Turner is living or dead, Mr. Lewis? A. He is dead.

Q. I will ask you if, while you were the agent, you had anything to do with the life insurance policy and the premiums of life insurance policy of Captain George D. Hill? A. Yes, sir, we did.

Q. I place in your hands Mr. Lewis, a letter bearing date May 31, 1887, signed Turner & Lewis. Examine it, if you please. In whose handwriting, if you know, is that letter and signature?

A. The entire letter is in my handwriting.

Q. Signature and all?

A. Signature and all, yes.

Q. I will ask you if you know Captain George D. Hill? A. I did.

Q. How long had you known him at this time?

(Testimony of Howard H. Lewis.)

A. Well, I supose I knew him from the time of my first coming to Seattle, which was in 1875.

Q. You resided here then?

A. I think that Captain Hill was here at the time I came. I am quite sure he was.

Q. Do you know what official position he held?

A. Yes, he was treasurer of King county for several terms.

Q. Do you know about his being connected with the Regular Army of the United States?

A. Well, of my own personal knowledge, I do not, except from general reports.

Q. Do you know that was the general report?

A. That was the general report.

Q. You have been about the courtroom and heard the question of his eligibility to hold a civil office tested because of his being an officer of the regular army?

Mr. PRESTON.—I object to that as immaterial.

The COURT.—Objection sustained.

Mr. ALLEN.—We now offer this letter in evidence, may it please your Honor, as the letter is identified by the witness.

Mr. PRESTON.—We renew our last objection made to the admission of the other letters.

Mr. WARBURTON.—I think we might add to that at this time the further ground that any statement or declaration of Mr. Hill is not binding on the parties to this action.

(Testimony of Howard H. Lewis.)

The COURT.—I will overrule the objection. Exception noted for the plaintiff.

(Paper received and marked Defendant's Exhibit No. 8 and read to the jury as follows:)

Defendant's Exhibit No. 8.

Copy.

THE MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Richard McCurdy, President.

A. B. Forbes, General Agent for Pacific Coast Office General Agency, No. 214 Sansome Street, San Francisco, Cal.

Seattle, W. T., May 31st, 1887.

A. B. Forbes, Esq., Gen'l Agt., San Francisco, Cal.

Dear Sir: We regret having to return you herewith prm. receipts of Hill, Berb & Budlong, as uncollected, We especially regret this in Capt. Hill's case as the policy is a large one, and his intention is to pay the premium, but he is short of money. He expects to have the money in a few days and if you can hold the receipt for a few days we will notify you by wire as soon as premium is paid and you can forward us receipt.

Very truly,

TURNER & LEWIS.

Rec'd A. B. Forbes. June 3, 1887, General Agent, S. F.

The following endorsement appears on the back:

(Testimony of Howard H. Lewis.)

"Defendant's Exhibit 8. Filed in the U. S. Circuit Court. Dist. of Washington, Sept. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. I also hand you a paper, Mr. Lewis, of date July 8th, 1887, signed Turner & Lewis, and ask you to examine that. Now, you may state, if you know, in whose handwriting that is.

A. That is also in my handwritng; the body of the letter and the signature.

Mr. ALLEN.—I now offer this letter in evidence, may it please the Court.

Mr. PRESTON.—We desire to preserve the same record on the admission of this paper as before and including the grounds stated by Mr. Warburton.

THE COURT.—Objection overruled, exception noted for the plaintiffs.

(Paper marked Defendant's Exhibit No. 9 and read to the jury as follows.)

Defendant's Exhibit No. 9.

Copy.

THE MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Richard A. McCurdy, President.

A. B. Forbes, General Agent for Pacific Coast, Office General Agency, No. 214 Sansome Street, San Francisco, Cal.

(Testimony of Howard H. Lewis.)

Turner & Lewis,
Real Estate, Loan,
and
General Insurance
Agents,
Seattle, Wash. Ter.

Seattle, W. T., July 8th, 1887.

Mr. A. B. Forbes, Gen'l Agent, San Francisco, Cal.

Dear Sir: We enclose herewith statement for June, with check for two hundred and fifty dollars ($250) to balance. We have included in this check 89c. due on last statement.

Also find herewith receipts No. 272,427, No. 274,069, No. 281,470, which we cannot deliver.

We hold over for collection of June receipts No. 270,-887, No. 292,593, No. 288,504, No. 271,554.

Very truly yours,

TURNER & LEWIS.

Since writing the above, we find draft of David Kellogg for $28.86, No. 98,560. Please credit us with this amount on next statement.

TURNER & LEWIS,

Rec'd A. B. Forbes Jul. 11, 1887, General Agent, S. F.

The following endorsement appears on back: "Defendant's Exhibit 9. Filed in U. S. Cir. Court, Dist. of Washington. Sep. 4, 1901, A. Reeves Ayres, Clerk. R. M Hopkins, Dep."

(Testimony of Howard H. Lewis.)

Q. Mr. Lewis, state if you know, how you happened to write the second letter of July 8th, 1887, after having written the first one?

A. The letter which you just read, the last one?

Q. Yes.

A. Well, the occasion of writing that letter was the return of the receipt.

Q. Just tell the jury what that receipt was.

Q. You mean the nature of the instrument?

Q. Yes.

A. That was the receipt signed by some general official of The Mutual Life Insurance Company. I have forgotten which official at this time, it is so long ago, but it was the receipt for the premium which was due upon the policy at that time.

Q. And upon the payment of the premium you are authorized to deliver the receipt to the holder of the policy?

A. We were to deliver the receipt to the policy holder for the payment of the money, and not otherwise.

Q. And if the money was not paid you would return the receipt to Mr. Forbes, would you not?

A. Yes, sir.

Q. You had returned it as you say in this letter of May 31? A. Yes, sir.

Q. And why was it you returned it again after it came to you and why was it you returned it again in July?

A. For the reason that we were unable to deliver the receipt.

(Testimony of Howard H. Lewis.)

Q. Why were you unable to deliver the receipt?

A. Because we were unable to collect the money that was due upon the receipt.

Q. And being unable to collect the premium you would return it? A. I returned the receipt.

Q. The premium receipt to Mr. Forbes, the general agent at San Francisco? A. Yes, sir.

Q. Did you see Captain Hill about this time yourself?

A. Yes, sir, I went and called upon Captain Hill at that time.

Q. Then you had occasion to talk to him about the premium being paid?

Mr. WARBURTON.—We object to any statement or declaration that Captain Hill made, for the reason that it would not be binding upon his beneficiaries.

The COURT.—Objection overruled, exception noted for the plaintiffs.

Q. And it was after talking to him in regard to the payment of the premium that you wrote these letters sending the premium receipt back? A. Yes, sir.

Q. State if he knew that you had the premium receipt here to deliver to him on payment?

A. Yes, silr, we always took these with us.

Q. Mr. Lewis, you may state, if you please, when you went out of partnership with Mr. Turner, about when?

A. Somewhere very close to March 1889.

Q. Did he or you keep the letters and correspondence?

A. I kept all the correspondence.

(Testimony of Howard H. Lewis.)

Q. I believe you went away yourself in 1895, did you not? A. I left here in 1895.

Q. To make your home in California?

A. Yes, sir.

Q. You may state what you did with the letters and correspondence you received and had from The Mutual Life Insurance Company attending to the business before?

A. Mr. Turner withdrew from the firm, leaving all the correspondence with me. I kept all the correspondence of the firm up to the time that I left Seattle. At that time I destroyed all the old letters of the firm.

Mr. ALLEN.—I ask these questions for the reason that I may want to introduce a letter-press copy of some letters.

Q. (The COURT.) Can you fix the time when you had the talk with Captain Hill about the premium?

A. I can only fix it from the date of these letters. This would be the only way that I would be able to fix it.

Q. Sometime between the two?

A. Sometime between the first and last letters.

(Testimony of witness closed.)

A. B. FORBES, a witness called on behalf of the defendant, being first duly sworn, testifies as follows:

Q. (Mr. ALLEN.) What, if any, position do you hold in the Mutual Life Insurance Company, the defendant in this case?

(Testimony of A. B. Forbes.)

A. I am their general agent for California at present, Nevada and the Hawaiian Islands.

Q. How is it as to this Northern country?

A. I am not representing them here. They are represented her by Mr. Gillespy or this party at Victoria.

Q. Up to what time was the state of Washington and British Columbia included in your work?

A. Up to 1895.

Q. How long have you been the general agent for the coast? A. Going on 33 years.

Q. And have you, during that time, had the management and general control of its business here.

A. Up to 1895, yes.

Q. Now, you may state, if you please, Mr. Forbes, say prior to 1886 and the years following, what was the custom and rule of the company taking insurance when an application was made for insurance, through a local agent. Was there any rule and custom as to what should be done with that and to whom it should be transmitted?

A. All local agents in my general agency were obliged to report officially and report all these applications to me.

Q. Then an application made in the State of Washington or British Columbia placed in the hands of your agent would be transmitted to you at San Francisco?

A. Yes, sir.

Mr. PRESTON.—We desire to preserve the same objection as to all of this.

(Testimony of A. B. Forbes.)

The COURT.—Objection overruled, exception noted for the plaintiffs.

Q. And you forwarded it to the home office at New York City?

Mr. PRESTON.—I renew my last objection.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. I forwarded them to New York City.

Q. You may state, if you know, whether there was any rule of practice obtaining during these years if the application was accepted as to what the company did with the policy, if it made one out?

Mr. PRESTON.—We renew our last objection to this.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. They made out the policy and sent it back to me from New York. I would send on sometimes fifty applications in the mail and they would send the policies back to me.

Q. And when they came to you, what was the practice?

A. I would mail them to different agencies—the agent from whence they had been received and would have them delivered on the payment of the premium.

Q. Now, coming to that question, what was the rule as to the policies when issued, being sent by you and received by you from the home office and sent by you to

(Testimony of A. B. Forbes.)

the local offices to different towns and places, for instance Seattle and Victoria after the receiving of the premium.

Mr. PRESTON.—We renew our last objection.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. When they received the policies they were ordered to deliver on payment of premium and then they would remit that premium to me when they received it and send a statement.

Q. So that the premium was paid when the policy was delivered at the residence of the insurer?

Mr. PRESTON.—We renew our last objection.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. Exactly so. They might call in the office of the agents sometimes but generally they take the policy to the business office of the insured.

Q. And what was the course after the policies were issued and delivered in the manner that you speak of in the first instance in regard to the collection of the premiums?

A. It was collected by the agent and remitted to me by the agent.

Q. From what sources, if any, did what was known as the renewal receipt or premium receipt come?

A. They came from the insured, the renewal receipt.

(Testimony of A. B. Forbes.)

About the second year we will say, or the third year, or whatever year it would happen to be if it was a policy, a receipt would be sent and forwarded to the agency where the insured resided and that would be collected and remitted.

Q. You forwarded the renewal receipt or the receipt for the premium?

A. I forwarded it to the agent, yes.

Q. And what was his authority in regard to it?

A. His authority was our instructions or my instructions as general agent and a receipt signed by the secretary of the company.

Q. What was his authority to deliver that except upon payment of premium?

A. That is all, that was the only authority that there was. All the authority was to see that the premium was paid.

Q. Give this renewal or premium receipt.

A. To the man who owned the policy, the insured.

Q. If the premium was not paid when due according to the date of the policy, what was the duty of the agent in regard to that receipt?

A. He had to return it to us because it represented so much cash in our charges or accounts.

Q. That was charged up against him?

A. Yes, sir.

Q. And whether he would return it back to you and you would return it back to him?

(Testimony of A. B. Forbes.)

A. I would return it to New York after a certain time. Sometimes agents would say if you will hold this a little while we think we can deliver it, and in such case we would hold it.

Q. Suppose, Mr. Forbes, the insured delayed in paying the premium?

A. Well, the receipt was returned to us immediately by the agent. We generally held the receipt a while in San Francisco, because some persons would get certificates of health and pay their assessments to the agent, and we would accept the money, so that the company would have the certificate to show that it was in accordance with our instructions.

Q. If a man failed to pay on a particular day a certificate of health became necessary? A. Yes, sir.

Q. That was procured from the surgeon?

A. From the examining physician. We had forms and we used to send them to the agent.

Q. In that case, with that certificate being furnished, the receipt might be delivered?

A. It would be delivered and the agent would forward the money and the receipt would be given to them. We would then advise the company and remit the money to them in that way.

Q. Mr. Forbes, do you remember anything about a policy being issued to George D. Hill?

A. Yes, sir, I do.

Q. That is the same policy that the witnesses have been testifying about?

(Testimony of A. B. Forbes.)

A. Yes, sir. We received the application first from Heisterman & Company, early in May, the 4th of May, I think.

Q. I show you this paper and ask you if you recognize that?

A. Yes, sir, I recognize this. This is the policy that was sent to us by the company. I think we have the letter here.

Mr. ALLEN.—We offer this in evidence.

Mr. WARBURTON.—We object for the reason heretofore stated.

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Paper admitted in evidence and marked Defendant's Exhibit No. 10 and read to the jury as follows:)

Defendant's Exhibit No. 10.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

New York, May 13, 1886.

A. B. Forbes, Esq.

Dear Sir: The following policies are sent by this day's mail.

Truly yours,

W. E. EASTON,

Secretary.

Name.	No.
J. D. Byrnes	281,449
Walter Behn	466
Geo. D. Hill	470

(Testimony of A. B. Forbes.)

Stamped on face: "A. B. Forbes, May 20, 1886, General Agent, S. F."

The following endorsement appears on the back: "Defendant's Exhibit 10. Filed in the U. S. Circuit Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. I will ask you, Mr. Forbes, to explain about the headings under the word "name" and under the word "number."

A. This is a form of business; for instance, they were all under the main number 281,000. The first number was 449, and so on.

Q. This should read then 281,449, J. D. Byrnes, Walter Behn, 281,446, George D. Hall, 281,470?

A. Yes, sir.

Q. What does this indicate this stamp mark on the bottom?

A. That indicates the day that I received this policy from New York, on the 20th of May, 1886.

Mr. ALLEN.—I have not a copy of this, but will ask permission to substitute a copy for the original, which I have just offered in evidence.

Q. I place this letter in your hands, dated May 5th, 1886, signed A. B. Forbes & Company and ask you if you recognize that.

A. I do. It is in the handwriting of one of my clerks, my head clerk, the corresponding clerk.

Q. Was that letter written by your authority and under your direction? A. It was.

(Testimony of A. B. Forbes.)

Mr. ALLEN.—We offer this letter in evidence.

Mr. WARBURTON.—We object for the reason heretofore stated.

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Paper received, marked Defendant's Exhibit No. 11, and read to the jury as follows:)

Defendant's Exhibit No. 11.

Copy.

May 15th, 1886, per Mexico 5-7.

Messrs. H. F. Heisterman & Co., Victoria, B. C.

Dear Sirs: Your favors 27th and 30th ult. duly received, covering April a|c, application of Geo. D. Hill and dft. for $528.90, as advised. Yours truly,

A. B. FORBES,

W. G. A.

The following endorsement appears on the back: Filed in the U. S. Cir. Court, Dist. of Washington, Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. I now place in your hands, Mr. Forbes, another letter, and ask you if you recognize that.

A. That is the same handwriting and by the same clerk; it is his business to attend to all that part of it.

Q. Was the draft for $528.90 in connection with the Hill matter?

A. No, I think not. (Referring to exhibit No. 11.)

Mr. ALLEN.—We offer in evidence the letter just identified by the witness.

(Testimony of A. B. Forbes.)

Mr. WARBURTON.—We renew our objections.

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Paper marked Defendant's Exhibit No. 12, and read to the jury as follows:)

Defendant's Exhibit No. 12.

Copy.

May 20th, 1886, Per Mexico, 5-21.

Messrs. H. F. Heisterman & Co., Victoria, B. C.

Dear Sirs: I enclose for collection Policy 281,470 Hill, Annual Prem. $814.00. Please collect and remit.

Yours truly,

A. B. FORBES,

W. G. A.

The following endorsement appears on the back: "Filed in the U. S. Cir. Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. Mr. Forbes, have you some other letters?

A. Yes, sir.

Mr. ALLEN.—I was going to offer the letter-press copy-book, but the letter books are at the office. We have copies of them here, and counsel say they may be taken the same as the letter-press copies.

Q. Please examine these copies.

A. These are the letters.

Mr. ALLEN.—We offer these letters in evidence.

Mr. WARBURTON.—We renew our objection to these letters.

(Testimony of A. B. Forbes.)

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Letter dated June 3d, 1887, marked Defendant's Exhibit No. 13, and letter dated June 6th, 1887, marked Defendant's Exhibit No. 14 and read to the jury as follows:)

Defendant's Exhibit No. 13.

Copy.

June 3d, 1887.

Messrs. Turner & Lewis, Agts., Seattle, W. T.

Dear Sirs: I have your favor of the 31st covering uncollected April renewals, viz:

281,470 Hill.
291,644 Berb.
273,908 Budlong.

If you wire me collection of Capt. Hill's renewal, No. 281,470—April 29th, $814, so as to reach me on or before 13th, I will advance the prem. in my May a|c and await your remittance.

After 13th a ctf. of the Health will be requisite. I enclose three blanks. Should you need them, the enclosed will prove handy.

Very truly yours,

pp. A. B. FORBES, G. A.

JON E. AGER.

The following endorsement appears on the back: "Filed in the U. S. Cir. Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

(Testimony of A. B. Forbes.)

Defendant's Exhibit No. 14.

Copy.

June 6th, 1887.

Messrs. Turner & Lewis, Seattle, W. T.

Gentlemen: Your telegram notifying of payment of Mr. Berb's prem. rec'd. I enclose his receipt, No. 291,644. Amt. $56.37. I also enclose renewal No. 281,470 Hill, $814, which I trust you will also be able to collect before the time mentioned in my advices, or failing in that, that Mr. H., when able, will reinstate the policy, furnishing a certificate of his good health.

We are anxious that Mr. Hill should not lose the benefit of premium already paid in.

Please hold this receipt till further instructions.

Yours truly,

A. B. FORBES,

Gen'l Agt.

F.

The following endorsement appears on back: "Defendant's Exhibit 14. Filed in the U. S. Cir. Court, Dist. of Washington. Sep. 4, 1901. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep."

Q. I will ask you, Mr. Forbes, where these original letters—you may state whether the letters, exhibits 8 and 9, were received in your office.

A. This one was received June 3d, 1887, and the second one was received July 11th, 1887.

Q. And they are a part of your files?

(Testimony of A. B. Forbes.)

A. They are a part of my files in my office at this time. This is one to the insurance department, and the other one came to—

Q. But the originals of these were received at your office as noted by the marks upon them, and are now a part of the files of the office.

A. Yes, sir. I was going to say that our letters of June 3d and 6th to Mr. Turner and to Turner & Lewis, were in reply to their first letter, and the second one written by my son, who was then cashier, was written under my dictation. I dictated the latter part of that letter. I also ordered him to return that renewal receipt at once to Messrs. Turner & Lewis, that they possibly might deliver it, and it would be better for them to have it at hand, subject to instructions by the first letter.

Mr. PRESTON.—I move to strike out the statement of the witness as to his reasons for dictating the letter.

The COURT.—Motion denied, exception noted for the plaintiffs.

Q. So the receipt had been sent up once and returned to you? A. Returned to me.

Q. And then, as stated in your letter, for the purpose of giving an opportunity of payment, you sent that back?

A. I sent it back because of the large premium, and we felt anxious to keep this policy before us.

Q. And the letter of July 8th to Turner & Lewis was the one that brought the receipt back to you?

A. They returned it promptly, yes.

(Testimony of A. B. Forbes.)

Q. You may state, Mr. Forbes, if you have, aside from the correspondence, a recollection in regard to the Hill insurance? A. I have a distinct recollection.

Q. What was it, if you please, that gave you this distinct recollection?

A. There was several points. One was that it was a large policy and a large premium.

Q. That would have been a large policy at that date in this country?

A. Yes, sir, in this part of the country, and we were very anxious to maintain this policy on our books, and for that reason I recollect distinctly that I dictated to my son and ordered him to return the receipt, and dictated what he should say to Turner & Lewis in regard to Captain Hill's premium, and that he might have the advantage, and credit him with what he paid in before.

Q. Now, you may state whether or not you know whether any other than the first annual premium was ever paid on this policy.

A. None came to me, to my agency, and I do not know of any other payment otherwise. I cannot say—I do not know of any. If the premium had been paid elsewhere I would have been advised, because it was of record in my agency, and they could have advised me of any premium paid in any agency, and they would have sent me a notice.

Q. You never had notice or information of anything more than the first annual payment?

A. That is all, sir.

(Testimony of A. B. Forbes.)

Q. There would have been no authority on the part of any agent to have paid it without the renewal receipt?

A. No, the company held me for all these receipts.

Q. Was there any renewal receipt after the return of this receipt to you by the letter of July 18th, 1887, ever sent up here from your office? A. For Hill?

Q. Yes. A. Never.

Q. These other letters, Mr. Forbes—I think I have called your attention to the Turner & Lewis letters, you have some other letters that I handed back to you, the originals of them. Now, you may state, if you please, if the originals of exhibits 5, 6 and 7, letters of Heisterman & Company, directed to you, were received at your office?

A. Yes, sir, they were received. The first one was May 4th, 1886; April 30th, 1886, that was received May 4th. The one of May 29th, 1886, was received June 1st, 1886, in our office, and the one of June 5th, was received June 21, 1886.

Q. And they are filed in your office under your own charge?

A. Yes, sir. I have a very complete file, and I keep all papers very carefully. If I send them to New York they send back the originals, and I am obliged to send back their originals to them.

Cross-Examination.

Q. (Mr. WARBURTON.) Mr. Forbes, I notice in your letter of June 3d (exhibit 13) you say "After the 13th a

(Testimony of A. B. Forbes.)

certificate of health will be requisite." And just before that you say, "If Mr. Hill's premium reaches you by the 13th you will advance the premium in the main account."

A. If he had received it by that time, you will see something about—

Q. I ask you if from that you made your report to the company for the main collections that you received on the 13th of June?

A. Yes, sir, on the 13th, and they were forwarded on the 15th of June.

Q. After you returned the receipt to the company in New York, the party would have to furnish a certificate of health before he could pay his premium?

A. No; the point was, that if he was later than that, he should furnish a certificate and then we would hold the receipt.

Q. I understand that, but after the 13th of June he would have to furnish a certificate of health?

A. Yes, sir.

Q. And if anybody had offered to pay it they would have had to furnish a certificate of health before the company would accept it? A. Yes, sir.

Q. How many days of grace would he have to furnish a certificate of health?

A. No days of grace were given.

Q. How could you give him until the 13th?

A. We gave that because it was a new policy and we had authority to do that.

Q. For a few days?

(Testimony of A. B. Forbes.)

A. For a few days on a new policy, yes, sir.

Q. That would be extending from the eleventh to the thirteenth? A. Yes, sir.

Q. After that he would be required to send a health certificate? A. Yes, sir.

Redirect Examination.

Q. (Mr. ALLEN.) No certificate of health was ever furnished in this case?

A. No. We sent blanks up.

Q. (Mr. WARBURTON.) You sent them to your agent?

A. Yes, sir, we sent them to our agent.

(Testimony of witness closed.)

JAMES FORMAN, recalled on behalf of the defendant, testifies as follows:

Q. (Mr. ALLEN.) I want to ask you, Mr. Forman, if the originals of the letters, exhibits 11 and 12, were received in the office at Victoria by Heisterman & Company?

Mr. PRESTON.—I object, because the witness has testified that he was not in the office until 1891.

Q. I will ask you to state, if you know, what the stamped mark, H. F. Heisterman & Company, Real Estate, May, 1886, Insurance Agents, Victoria, B. C., and the one, H. F. Heisterman & Company, Real Estate, May 22, 1886, Insurance Agents, Victoria, B. C., indicate from the practice and course of business of that office?

(Testimony of James Forman.)

Mr. PRESTON.—We object because the witness cannot be familiar with the practice of the office before he was in it.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. I can only say that these letters came to me in that form from the office files. As far as I know they have been there from the date received. That is the date they were received in each case. I recognize that stamp as a date stamp in the office. It was still in use when I went into the office, and that is the date these letters were received.

Q. That was the practice and custom and system to stamp the date received? A. They did it, yes.

Q. These papers are filed in the office of Heisterman & Company?

A. Yes, sir, taken from their files, we keep our files in a fire proof vault. I took these out myself.

(Testimony of witness closed.)

At this time further proceedings were adjourned until to-morrow morning at ten o'clock.

Seattle, September 5th, 1901, 10 o'clock A. M.

Continuation of proceedings pursuant to adjournment.

Mr. ALLEN.—May it please the Court, I wish to offer in evidence the application and petition of George D. Hill to have Mr. Eben Smith appointed guardian of his children. This application was made in March, 1888, and a showing made upon it and the fixing of the bond

in the case at five thousand dollars. I desire to offer this for the purpose of showing that Mr. Hill was at this time here in the city of Seattle, and that at this time he was the person representing these plaintiffs. He set up that he was the father and the natural guardian and that following what we have already shown in regard to the notice brought home to Captain Hill, and that he makes no mention whatever of this insurance, and that the amount of the bond, five thousand dollars, excluded the idea of its being a property asset. For these and the other reasons appearing upon the face of it I desire to offer it in evidence.

Mr. PRESTON.—This proceeding, as I understand from Senator Allen, was offered first to prove that at the time the petition was filed, George D. Hill was a citizen of this city. That has already been proved by their evidence, and is admitted in the pleadings. Second, it is to show that at time, perhaps two years after Mrs. Hill's death, it is a sort of a declaration of George D. Hill to the effect that this policy was not in force because he did not refer to it or mention it in his general statement of what property the estate consists of. He says it consists largely of real property. We object to it on the ground that it is incompetent, irrelevant and immaterial as against these plaintiffs. The point of the objection that I desire to call directly to your Honor's attention is, that his statement would not be binding upon these plaintiffs, even if it were his statement.

Mr. ALLEN.—I offer this for the purpose named and for the purpose of showing that these children were here in Seattle; that their father was acting as the natural guardian up to that time, that he knew and is the person who is charged by virtue of this policy of insurance and is given charge of the whole matter of paying the premiums and receiving the notice of everything in relation to that, and that he had notice given to him, as we claim, for the preceding year. That as the time approached for another annual premium to become due, he occupied this position to these children, and that he sought to have a guardian appointed and that he made no suggestion whatever of there being a policy that he was keeping up and that had not been abandoned. And presenting the matter to the Court he has made no mention of this matter, and that in taking a bond to protect the property of the estate of these children in the sum of five thousand dollars, would indicate that this policy was not contemplated. For all of these reasons and to meet the claim that is made here that these plaintiffs had no notice in any way and that they have not been in default, we have the right to make this showing of this conduct on the part of one who has the entire matter in charge.

The COURT.—I sustain the objection. It is not necessary to mass and pile up evidence here to prove that these children lived with their father during his lifetime, or that they lived in Seattle, or what the relations were between them and their father. Enough has already been proved and admitted to cover all that ground,

and this document as an admission against the interests of the plaintiffs is, as I think, clearly inadmissible, Is not anything that appears to have been made in direct contemplation of any such fact as that. There appears to be nothing in the paper to show that Captain Hill had this policy in mind at all in making out that paper. I sustain the objection and will allow the defendant an exception.

Mr. ALLEN.—I have still another item of testimony on the same line that I wish to present, and that is the petition of Eliza Maude Hill before the Probate Court in the matter of the guardianship and seeking and accounting of the estate telling what it consisted of and the showing of its limits and the enumeration of the only life insurance, amounting to six thousand one hundred and fifty dollars and giving the names of the companies in which it was placed, and that it had been collected and making no showing whatever in any way of any claim of any kind being thought of as being in existence at that time as late as 1893. I state this to the Court so that as these two papers are together I can have them identified and then have the ruling made upon them.

Mr. PRESTON.—If your Honor please this paper can only be offered on the theory that it is an admission of one of the plaintiffs here. Of course, as said, it would only be admissible as against her interests in this litigation. It seems there is nothing in the paper making the admission relevant to the issue. I will submit the paper

(Testimony of Sherwood Gillespy.)

to your Honor. I object to it on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—I sustain the objection.

Mr. ALLEN.—In order to preserve my exception, I desire to make a statement. It is agreed by counsel that this be treated the same as if duly authenticated. There is no question made upon the authenticity of the paper presented.

The COURT.—I sustain the objection on the ground that it is incompetent and irrelevant.

Mr. ALLEN.—I would like to have the two papers fastened together and marked exhibit for identification

(Papers marked Defendant's Exhibits Nos. 15 and 16 respectively, as offered and refused.)

SHERWOOD GILLESPY, a witness called on behalf of the defendant, being duly sworn, testifies as follows:

Q. (Mr. ALLEN.) Are you in the employ of The Mutual Life Insurance Company? A. I am.

Q. How long have you been in that employ?

A. I have been with the company since 1881.

Q. You are its general agent in the State of Washington? A. Washington.

Q. Mr. Gillespy, have you been associated with the managing officers of this defendant and familiarized yourself with the course of its business since your employment with it?

A. First as an agent and afterward as a managing

(Testimony of Sherwood Gillespy.)

agent for outside work of the company, and since that with the general agency work for six years.

Q. You have been about the headquarters and associated with its managing officers?

A. Been there all my life.

Q. Mr. Gillespy, the charter of the company offered in evidence provides that certain reports shall be made periodically to the members of the company. I wish you would state if you please, to the jury, how often these reports are made.

Mr. WARBURTON.—I object as incompetent, irrelevant and immaterial. What reports this company makes to policy holders or to the insurance commissioner of New York, or to any insurance commissioner cannot affect the plaintiffs in this case.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. They issue their reports annually, showing the assets, liabilities and surplus of the company, the death claims paid and the lapses and surrenders.

Q. All of these matters are reported each year to the company. I see the charter provides every five years.

A. That was the charter.

Q. They make the same report, do they not, every year?

A. They do—ever since I have been with them.

Q. And you may state, if you know, in case a policy becomes lapsed for nonpayment of premiums, how is that

(Testimony of Sherwood Gillespy.)

noted by the company as to being a liability or not in these reports.

Mr. PRESTON.—I object for the reason last stated.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. If the policy is only in effect one year it is a lapsed policy. If for three years it has a paid up clause which is a liability for as many parts as the insured has paid premium.

Q. So that if one annual premium is paid there is no benefit to the holder of the policy beyond a one year's protection? A. That is all.

Q. The one year's insurance that he has?

Mr. PRESTON.—I renew our last objection.

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. Nothing else.

Q. Now, Mr. Gillespy, you say that if the premium is not paid within one year then the policy is noted as a lapsed and forfeited policy? A. Yes, sir.

Q. And ceases to be a liability of the company in these reports? A. Yes, sir.

Q. Mr. Gillespy, in case a loss occurs and the amount of a policy is paid, from what fund is that paid?

Mr. PRESTON.—We object as incompetent, irrelevant, and immaterial.

The COURT.—Objection overruled, exception noted for the plaintiffs.

(Testimony of Sherwood Gillespy.)

A. From the reserve.

Q. What is the reserve?

A. A certain amount of money out of the premiums laid aside at 3 per cent or 3½ now. This reserve is made up of investments that are absolutely secure, as far as they can be made, and all of such claims are paid out of this reserve.

Q. That is what the reserve fund is for?

A. Yes, sir.

Q. It is the accumulation of the amount of the premium paid in and of the incomes that make it up?

A. That makes the reserve.

Mr. PRESTON.—To avoid getting confused, the witness has testified a certain percentage and now he testifies that is all.

A. The reserve is made up of a certain percentage of the premiums invested.

Mr. PRESTON.—That percentage is three or three and a half?

A. No, it is invested at three and a half per cent.

Q. What percentage is it?

A. I cannot tell the percentage.

Q. Now, Mr. Gillespy, that being the fund out of which the losses of the company are paid in case of death, if that reserve fund is not consumed by paying losses in case of death, how else is it applied?

Mr. WARBURTON.—We object as incompetent, irrelevant and immaterial.

(Testimony of Sherwood Gillespy.)

The COURT.—Objection overruled, exception noted for the plaintiffs.

A. Well, the reserve is the amount that the death losses are paid out of, and this reserve computed at three and a half per cent may make the face of the policy on the mortality table.

Q. Now, suppose the reserve is more than sufficient to pay the death losses? A. It goes into the surplus.

Q. And going into the surplus, then what is done with it?

A. Then it is divided among the persistent payers.

Q. That is, divided among all the members?

A. Persisting in paying their premiums.

Q. Persisting in paying their premiums?

A. Yes, sir.

Q. And they get that, either by credit on the premiums they pay or increasing the amount they have?

A. Increasing the amount of their insurance.

Cross-Examination.

Q. (Mr. WARBURTON.) Did I understand you, Mr. Gillespy, that policies when matured they are paid altogether out of reserve fund?

A. No, I did not say they were paid out of the reserve fund. The death losses are paid out of the reserve fund.

Q. Altogether?

A. As far as I know they are paid out of the reserve.

Q. Is it not the fact, Mr. Gillespy, that theoretically

(Testimony of Sherwood Gillespy.)

a premium is divided into three parts, a reserve, and the amount that will pay the operating expenses of the company, and then an amount which they estimate will pay the death losses which come in in that same class.

A. There is a reserve for the fund out of which death losses are paid as they occur.

Q. Now, what is the reserve, for instance, do you know what the reserve on Mr. Hill's policy $814 for a straight life policy would be?

A. No, sir, I am no actuary.

Q. Would it not be about 47 to 49 per cent?

A. I could not say.

Q. Have not you got the books to show exactly?

A. No, sir.

Q. Have you not got any showing to show the exact reserve? A. No, sir.

Q. On a policy of that date? A. No, sir.

Q. There would be a reserve?

A. There would be a reserve the first year.

Q. As an insurance agent do you know it is pretty nearly half? A. Yes, sir.

Q. Where did the other half go?

A. Commissions and doctor's fees.

Q. How about the second year then. The reserve would be the same the second year as the first?

A. I think so.

Q. Now, if it was 50 per cent, where would the other 50 per cent go?

(Testimony of Sherwood Gillespy.)

A. The reserve that is laid aside for death claims to meet the face of the policy on the expectation of life.

Q. Then about three or four dollars a thousand in addition to that is set aside for operating expenses, is it not? A. Yes, sir.

Q. And then the balance is set aside to pay death losses? A. I suppose so.

Q. Then if they are sufficient, then you do not work on the reserve at all?

A. Practically the first year's premium is eat up by expenses and commissions and fees.

Q. You do not mean to say that you could do that under the statute of New York?

A. I do not know the figures, I am only giving an estimate.

Q. Is it not a fact that the law in New York State requires a certain amount to be set aside.

A. A certain amount to come out of each premium.

Q. That applies to the first year as well as the rest?

A. Yes, sir.

Q. Then you could not use it up legally, could you?

A. For death claims.

Q. For expenses?

A. Yes, if you use it for death claims only.

Q. You could not use it for death claims?

A. Yes, sir.

Q. At the end of that policy or his life, you had to show that amount was still on hand?

A. If the policy is enforced.

(Testimony of Sherwood Gillespy.)

Q. You have got to keep a reserve at all times on hand, have you not? A. Yes, sir, certainly.

Q. Death losses come out of the balance altogether?

A. Well, as I understand it, the death losses are paid out of the reserve of the company.

Q. I understand just the contrary. That you cannot touch the reserve.

A. We only have a reserve and a surplus, that is all that we have.

Q. You only set aside forty-seven per cent—it varies from 35 to 55 per cent?

A. I do not know the amount.

Q. And the balance goes to pay death losses and operating expenses.

A. Figuring up a paid-up insurance for a party, we usually figure out seventy-five per cent reserve—the reserve is about 40 or 45 roughly.

Q. Now, to make it clear to the jury and the Court, what becomes of the first year's premium, segregate it and tell the Court and jury.

A. The first year's premium is used up for reserve and expenses.

Q. How much for reserve, about?

A. I could not say.

Q. Well, it would be about fifty per cent?

A. Might be, I could not say.

Q. Cannot be much less than that.

A. I cannot say, I do not know.

(Testimony of Sherwood Gillespy.)

Q. The balance of it goes to commissions?

A. Commissions and medical fees.

Q. How much of it is expended the first year?

A. I have no way of knowing, Mr. Warburton.

Q. You know about the commissions?

A. I know the commissions that I get; I do not know what others get.

Q. You know about what commissions are generally paid during that length of time at the head office, do you not? A. Yes.

Q. What are they?

A. Well, what do you mean, brokerage contracts or general agent's contracts.

Q. General agents?

A. Sixty-five to seventy per cent in renewals.

Q. And doctors' expenses? A. Yes, sir.

Q. To be added to that? A. Yes, sir.

Q. And then a small commission to the general agent in addition to that?

A. Yes, sir. The first premium is used up in expenses.

Q. More than taken from the policy here to pay the first year.

A. I would not say the first premium.

Q. How about the second premium?

A. That is divided into the reserve and the renewal.

Q. What percentage do you generally get on that?

A. Seven and one-half to ten per cent, but he pays the expenses.

(Testimony of Sherwood Gillespy.)

Q. He does not pay the office expenses?

A. They do.

Q. What percentage of the second premium goes into the reserve? A. I could not say.

Q. You have seen these books that show the amount of the reserve, have you not?

A. I never looked at them as to the figures.

Q. You never did? A. No, sir.

Q. You could not tell one of your policy holders the amount of reserve on his policy?

A. If he was to ask that I would ask an actuary.

Q. There are books which show exactly the amount on a policy? A. No sir.

Q. Do you know there is a book of that kind published by Mr. Fitz Hughes that is authority?

A. We have only a general reserve, we only reserve on our policies as a whole.

Q. That authority gives your reserve?

A. Not that I know of. It gives the reserve in our company as a whole. I have no way of figuring in our office the cash value of the policy. We would make an estimate and come near it, but we have no way of figuring accurately. This is always figured by the actuary for us.

Q. Can you do that yourself?

A. If I have a paid-up policy and a man asks what he can get on it, I can tell within forty or fifty dollars what he can get for it.

(Testimony of Sherwood Gillespy.)

Q. Can you tell the amount of a paid-up policy?

A. I can tell him that.

Q. Then you would have to figure the reserve, would you not? A. No, sir.

Q. On straight life?

A. On straight life, yes.

Q. You would have to figure straight life?

A. That is where I would fall down; I could not give accurate figures.

Q. You made the statement that on three annual premiums you would give the policy holder a certain amount of paid-up insurance, and that would be on the basis of the percentage the premiums would bear to the whole amount to be paid per thousand, but that is not true as to straight life?

A. That is, as to a limited endowment.

Q. It would not be true as to endowment, either, would it? A. Yes, sir.

Q. It would be about twenty or ten or thirty?

A. Ten paid.

Q. That is possibly true. But it would not be as to straight life? A. No, sir.

(Testimony of witness closed.)

Mr. ALLEN.—The defendant rests.

Mr. WARBUTON.—The plaintiffs rest.

Mr. ALLEN.—May it please the Court, at this time we feel it our duty to make a motion to your Honor to instruct the jury to return a verdict for the defendant on the whole case.

Mr. WARBURTON.—I think it would be proper to state at this time that we ask the Court to instruct the jury to return a verdict for the plaintiffs in the sum of twenty thousand dollars, together with interest from the 3d day of February, 1891, less premiums unpaid and interest unpaid.

Mr. ALLEN.—From the attitude of counsel the case has become one exclusively of law.

The COURT.—Mr. Allen, you may have your motion noted and state the grounds as fully as you wish to have your objections preserved in the record. I have thought about this case a good deal and I think it ought to be tried out fully at this time and I will submit it to the jury for a verdict. After a verdict either party may move against the verdict, move for judgment or move for a new trial, or make both motions if you want to and to make the record full for review in the Appellate Court, and I will hear your argument at that time instead of taking up time to do it now. This case has been once through the course of a law suit up to the court of final resort, been through this court and up to the Supreme Court of the United States and sent back here without having the law of the case settled. Now, a good deal of time has been consumed in this litigation to no purpose, and my object is to have your record made up so complete that if either party does take this case again up to the higher court that it will be in shape so that a final determination can then be made. I will let the jury pass upon it, and I will hear your law argument after-

wards and give you the best judgment that I am able to after hearing you fully.

Mr. ALLEN.—The defendant moves the Court to instruct the jury upon the whole case, to render a verdict in favor of the defendant. Did your Honor wish me in addition to that to particularize?

The COURT.—I think it would be well for you to do so, if you want the point in the record preserved for review in another court. I assume that if this case is taken up to the higher court after it has been fully tried out, that then directions will be given as to exactly what judgment to enter. If the Appellate Court should be of the opinion that on this whole record you are entitled to a peremptory instruction to render a judgment in your favor non instante they will so decide. My only object now is to have the record made up so that you will have your exceptions to any ruling as a basis for a review. Now you can state your grounds as fully as you want to have the record complete here to show that you do not waive anything.

Mr. ALLEN.—I would like then, may it please your Honor, to make a statement as I have made it, making the statement more complete and comprehensive and I will proceed to state some of the reasons why I ask the Court to instruct the jury upon the entire case to return a verdict in favor of the defendant.

1. Because the issue was joined as to whether the contract of insurance, the policy of insurance was made and delivered in the State of New York or the State of Wash-

ington. That all the evidence in the case is, that the contract of insurance was actually delivered at Seattle, in the State of Washington, and the first annual premium was there paid in exchange for the policy, when it was delivered to the insured, Captain George D. Hill, and that the contract thereby, under the ruling of the Supreme Court of the United States, became, as a matter of fact, a Washington contract.

2. That issue has been made as to whether the conditions of the policy were performed on the part of the insured, entitling a recovery; that it is specifically denied that either the insured or anyone on his behalf, ever paid any premiums, saving and excepting the first annual premium upon the delivery of the policy; that there is no proof whatever tending to show that any premium whatever, save the first premium on the delivery of the policy was ever paid; and that there is sufficient proof to show that nothing but the first premium ever was paid.

3. Because it is admitted in the pleadings, and stipulated by the parties, that the residence of the insured, George D. Hill, from the time of the application for the policy of insurance, down to his death, was at Seattle, Washington; and that during all of that time his post-office address was at Seattle, Washington, and that he had no post office address in the State of New York.

4. Because it is shown that the policy was actually delivered on the payment of the first annual premium at Seattle, Washington, and there became a contract under the laws of the State of Washington; and because the

policy expressly provides that no notice whatsoever, save and except that named in the policy itself shall be given of the due-date of premium. And because, also, the application itself, which was executed at Seattle, placed in the hands of the company by the applicant for insurance, contains a notice and warning that no notice is to be given of when premiums become due upon the policy, if it shall be entered into, and the application is accompanied with the form of policy, in which, as in the policy actually issued it is expressly provided that no notice whatsoever of the due-date of premiums shall be given, any statute to the contrary notwithstanding.

5. Because it is shown, and not contradicted, that at the time the second annual premium of April 29th, 1887, became due, the agent of the defendant being in possession of the renewal receipt, applied to the insured George D. Hill, to make payment of the premium then due, in exchange for the receipt, at the city of Seattle; and that he failed to do so because not in funds, and that the company again placed the renewal receipt in the hands of its agents at Seattle, who again called upon George D. Hill to make payment upon the policy, but that he failed and refused to do so, and the renewal receipt was returned to the company, because he had failed and declined to make the payment.

6. Because it is admitted in the pleadings in the case that none of the plaintiffs ever paid any premium or caused any premium to be paid after the one on the delivery of the policy, and have failed to do so, and have made claim that they were not called upon to do so, except notice was served upon them.

7. Because, in the whole transaction of this insurance so far as dealing with the premiums is concerned and meeting the conditions of the policy, George D. Hill acted for all parties, and notice to him and knowledge on his part, failure or omission on his part, was notice, knowledge, or failure as the case may be, on the part of all the plaintiffs in this case; and they cannot have the benefit of this policy of insurance upon the life of George D. Hill and this contract made with him except by ratifying his conduct and being controlled and governed by his conduct in regard to the policy, and whatever would bind him or estop him or terminate the contract, so far as he is concerned, has the same effect with them.

8. Because in this case it is proven that the defendant company is a mutual life insurance company or association, whose membership consists of its persistent policy holders and that the burden of paying losses falls upon the persistent or policy performing members of the company; and that where, as in this case, there were four consecutive years allowed to pass without the payment of any premium or part of a premium whatever on the policy, the plaintiffs, the beneficiaries in this case, not having paid or offered to pay, or in any way make good the liability for premiums, cannot recover from the company, or the other members of the company, upon the policy which has been in default, as shown in this case for a period of four years and upon which a single annual payment was made.

9. Because if the statute of New York in any manner affects the policy of insurance in this case, and the ques-

tion of notice of the due-date of premiums, it does so solely by the convention of the parties and not by operation of law, and the parties have expressly agreed that the statute, such statute in regard to notice, shall not apply to this policy.

10. Because this case, as made by the complainants rests upon compliance with the terms and conditions of the policy of insurance and not upon any failure of the defendant to comply with the statute of New York relative to the giving of notice of the due-date of premium. The allegation in the pleadings being that the ground of recovery is that the insured beneficiaries performed the conditions of the contract of insurance.

11. Because there is a variance between the case pleaded and the case set up and relied upon by the plaintiff in departing from the contract of insurance and performance of its conditions as a ground of recovery, and abandonment of that ground of recovery, that claim of recovery, because of the failure to give the statutory notice prescribed by the statute of New York.

12. Because the notice under the statute of New York and the statute of itself, has reference to the forfeiture of premiums already paid on the policies and the advantages accruing therefrom or the reserves thereon and to nothing else; that such were the only things capable of forfeiture.

Now, upon the general ground that I have made, as well as upon these enumerated grounds, may it please your Honor, I ask the Court to instruct the jury to find a verdict in favor of the defendant.

The COURT.—The motion is denied and an exception is asked and noted for the defendant.

EXCEPTION NO. 2.

(As applicable to this exception, and that of all instructions requested and refused, it is stated that each of said requested instructions was in writing and was requested immediately upon the conclusion of the testimony and before argument to the jury, and while the jury were in the box, and that exception in giving each of said instructions was duly taken and allowed in open court in the presence of the jury, and before it had retired to consider of its verdict.)

Refusal of the Court to give defendant's requested instruction No. 1 as follows:

"I.

"The Court instructs the jury as a matter of fact the contract of insurance sued on did not become an existing contract until it was delivered to the insured George D. Hill at Seattle, Washington, when and where the first annual premium was paid, but it was, at the time when this contract came into being, agreed by and between the parties that it should be construed to be made in New York City, but it was at the same time agreed between the contracting parties that no statute, whether of New York or elsewhere, should require any notice to be given of when any premium on the policy fell due, but that the policy itself afforded the notice and all the notice of the date at which the premiums fell due, to wit, on the 29th day of April, 1887, and the same day

of each succeeding year during the continuance of the policy, and if not so paid the policy should terminate and become void. It is denied by the answer that any part of the premium falling due April 29th, 1887, was ever paid. If this premium was not paid then the policy became forfeited and ended, and the plaintiffs have no right to recover. The Court instructs you there is no evidence before you that this premium falling due April 29th, 1887 or any part of it, or any subsequent premium, was ever paid, but on the contrary the evidence is that such premium was not paid."

The evidence is undisputed that the policy of insurance was delivered at Seattle, Washington, at the time when the first premium was paid. The undisputed evidence is that no other than this first premium was ever paid upon said policy; that the insured, George Dana Hill, died in the State of Washington, December 4, 1896.

EXCEPTION NO. 3.

Refusal of the Court to give defendant's requested instruction No. II, as follows:

"II.

"The plaintiffs in this case admit that aside from the first premium paid in 1886 upon the delivery of the policy none of them have ever paid any premium upon this policy. The answer denies that any premium save the first upon the delivery of the policy was ever paid by anyone. The Court instructs you there is no evidence in the case tending to show that any premium, save the first annual premium paid upon the delivery

of the policy, ever has been paid, while on the contrary there is evidence tending to show that no such premium ever has been paid, and upon this state of facts you should render a verdict in favor of the defendant."

The plaintiffs in this case admit that aside from the first annual premium paid in 1886, upon the delivery of the policy, none of them have ever paid any premium upon this policy.

The same facts apply to this as to exception No. 2, and the evidence is that it is a conceded fact there was a default in the premium falling due April, 1887, and every subsequent year, to the death of the insured in December, 1890.

EXCEPTION NO. 4.

Refusal of the Court to give defendant's requested instruction No. III as follows:

"III.

"The Court instructs you that there is no evidence in this case tending to show that the insured George D. Hill, at any time from the time of making his application for the policy sued on in April, 1886, to his death, December 4, 1890, had any postoffice address in the State of New York, but on the contrary it is stipulated and agreed by the parties that during all of that time his postoffice address was at the city of Seattle in the State of Washington. The Court instructs you as a matter of law that the defendant was not required by any statute of the State of New York, or elsewhere to serve a notice of the date when the premium became due upon the insured George D. Hill, except he had a postoffice

address in the State of New York, and as the Court has advised you, there is no evidence that he had a postoffice address in the State of New York, or anywhere, save in the city of Seattle, State of Washington."

EXCEPTION NO. 5.

Refusal of the Court to give the defendant's requested instruction No. IV, as follows:

"IV.

"The Court instructs you that if the insured, George D. Hill failed to pay the premiums upon the policy sued upon, falling due on the 29th day of April, 1887, the 29th day of April, 1888, the 29th day of April, 1889, and the 29th day of April, 1890, then he abandoned the contract and the same became terminated, and there would be no right on the part of these plaintiffs to recover, and your verdict in such case should be in favor of the defendant. The Court instructs you that there is no evidence tending to show that said George D. Hill, or anyone, paid any of the premiums for any or all of these four years, but there is evidence tending to show that he did not, and that such premiums were not paid."

The evidence as before stated is that default was made in the payment of the premiums falling due in April, 1887, 1888, 1889 and 1890, and is also undisputed that a local agent of defendant presented its official receipt for the second annual premium when it became due and requested payment and held the receipt for a time for payment, and upon nonpayment returned the same to the general office of the company at San Francisco, in the State of California, which again sent the

receipt to the local agent and he again presented it and gave him opportunity to make payment. But no further premium was ever paid. The evidence is also to the effect that all of said plaintiffs who were minors, resided in the home of the insured George Dana Hill at Seattle, Washington, as members of his family until the time of his death in December, 1890.

EXCEPTION NO. 6.

Refusal of the Court to give defendant's requested instruction No. V, as follows:

"V.

"The Court instructs you that the plaintiffs in this case rely for their recovery upon a performance of the conditions on their part or that of the insured, as the ground of their right to recover, and that one of the conditions upon which such right of recovery rests is that the premiums falling due on the 29th day of April, 1887, and on that day of each succeeding year during the life of said Hill, which ended December 4, 1890, were paid. The Court further instructs you that there is no evidence whatever tending to show that any of said premiums were ever paid or caused to be paid, and under the case as made by plaintiffs, recovery cannot be had for failure on the part of the insurance company to comply with any statute of the State of New York relative to giving notice as to when the premium or premiums fell due. To allow the plaintiffs to recover because of failure to give notice under the statute of New York would be what in law is termed a departure in pleading which cannot be permitted.

Va. The Court instructs you that in matters relating to the payment of premiums upon this policy the insured George D. Hill was the agent or trustee of the plaintiffs, with full power to bind them in that respect, and any failure, omission or act on his part to make payment of a premium or premiums as the same became due, became their failure, omission or act."

The evidence applicable to this is as in the foregoing exception, and in their pleadings each of the plaintiffs admit their failure and omission to make payment of any premium. The proof is that the policy of insurance was delivered to George Dana Hill. There is no evidence that it went out of his custody or control during his lifetime.

It was proved that all the plaintiffs lived with their father during his lifetime at Seattle and were under his parental care during such time.

EXCEPTION NO. 7.

Refusal to give defendant's requested instruction No. VI, as follows:

"VI.

"The Court instructs you that the defendant in this case is a mutual life insurance company or association, whose membership consists of what in law is known as its 'persistent policy holders,' that is, the policy holders of the company keeping up their policies by the payment of premiums as falling due, and if you find that the premiums on the policy in suit falling due Apri 29, 1887, 1888, 1889, and 1890, were not paid and have not

been paid, and the Court further instructs you that there is no evidence that any of the same have paid paid, then the Court instructs you your verdict should be in favor of the defendant."

The proof is undisputed that the defendant is a mutual life insurance association depending upon the payment of premiums by its members for the means with which to meet its obligations to its persistent policy holders and that no other than the first premium had been paid upon the policy in suit, and that no offer or tender of payment of any delinquent premium had been made up to the time of trial.

EXCEPTION NO. 8.

Refusal to give defendant's requested instruction No. VII, as follows:

"VII.

"The Court instructs you there is no statute of New York, nor any law, requiring or directing the defendant insurance company to give any notice to any of the plaintiffs in this case as to when premium upon the policy sued upon became due. Plaintiffs had the right, however, by virtue of their interest in the policy, to have paid any premium at the time it fell due, and the defendant would have been bound to accept it. It would have been the duty of the plaintiffs, or any of them, to have made tender of the amount of the premium at the time it fell due, to the company or some of its authorized agents. There is no proof, however, that any such tender was made, but upon the contrary the pleadings

admit that none of the plaintiffs ever did pay or cause to be paid any such premium."

EXCEPTION NO. 9.

Refusal to give defendant's requested instruction No. VIII, as follows:

"VIII.

"Upon all the evidence in the case gentlemen of the jury, the Court instructs you to find a verdict in favor of the defendant."

EXCEPTION NO. 10.

Error on the part of the Court in giving the following instruction to the jury, excepted to at the time by defendant:

"Now, a refusal implies an affirmative act with knowledge and with an opportunity to act. It is not synonymous with omission; a mere omission to pay the premiums has no such effect, but the defense that is interposed here is that these plaintiffs with knowledge that the premiums were due and were unpaid, refused to pay them and that is the question which I submit for you to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiff in this case as would amount to a refusal to pay the premiums, or whether there was any expressed contract or agreement since the delivery of the policy which amounts to an agreement on their part to surrender the policy or abrogate the contract."

EXCEPTION NO. 11.

Error on the part of the Court in giving the following instruction, excepted to at the time by defendant:

"There is another question which I submit to the jury, and that is, whether Captain Hill himself, whose life was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or the trustee of the plaintiffs and his act would not be an equivalent to their act but the contract was made by him, and his failure to pay the premium, if it was known to the plaintiffs and was acquiesced in by them and ratified by them, would be an abrogation of the contract. His act, not especially authorized or ratified, would not have that effect."

EXCEPTION NO. 12.

Error on the part of the Court in giving the following instruction, excepted to at the time by defendant:

"If you find from the evidence that there was any affirmative act on the part of these plaintiffs or any act of their father, that was approved and ratified by them, which abrogated this contract in any way, your verdict would be for the defendant. If there was no such subsequent abrogation of the contract, your verdict would be for the plaintiff and you will return a verdict in favor of the plaintiffs in the sum of twenty-nine thousand and twenty dollars."

EXCEPTION NO. 13.

Error of the Court in refusing to sustain defendant's motion for a new trial on the ground that the verdict was contrary to the law and the evidence.

EXCEPTION NO. 14.

Error on the part of the Court in refusing to sustain

the motion of defendant for judgment in its favor, notwithstanding the verdict returned in said cause.

The following is in full the Court's charge to the jury:

"CHARGE OF COURT TO JURY:

"The COURT.—Gentlemen of the Jury: This is an action brought by the plaintiffs, who are the children and heirs of George Dana Hill, to recover the amount of insurance upon the life of George Dana Hill, written by the defendant company in the policy described in their complaint.

"It is conceded that the defendant's company issued the policy and received payment of the first annual premium. The issuing and delivering of the policy and the receipt of the premium put the contract in force so that it became a binding obligation upon the defendant company. By the terms of the policy the company insured the life of George Dana Hill for the period of one year, for the amount of money which it received, and it also insured his life and became liable to pay to his wife, if living, or otherwise to his children, if she did not survive him, the amount of the insurance at the time of his death, upon the condition that the annual premiums should be kept paid. There was as much obligation on the part of the beneficiaries in this policy to pay the insurance company the annual premiums provided for, as there was upon the part of the defendant company to pay the insurance at Captain Hill's death.

"It is also a conceded fact in the case that no other premium was ever paid to the company except the first one, and that there was a default made in the payment

of premiums, which accrued on the 29th day of April, 1887, and on the same date in 1888, and the same date in 1889, and the same date in 1890.

"Ordinarily, where parties are free to make their own contracts according to the disposition of their own minds, a contract, conditional, as this one is, would be terminated as to the rights of the defaulting party and as to the obligation of the adverse party, by a breach of the conditions of the contract as there has been in this case, but there is a question in this case as to whether the rights of these plaintiffs are not saved by a provision in the statutes of New York which was in force during the time intervening between the issuance of the policy and the death of Captain Hill, which denied to the insurance company the right to claim a forfeiture for nonpayment of premiums or to claim that the policy had lapsed because of the nonpayment of premiums, unless the company proceeded in a manner provided specially by the statute for giving notice containing specific declarations provided in the statute, which notice had to be sent to the person whose life was insured, by mail, at least thirty days before a forfeiture could be claimed. Now, that question, whether the rights of the parties are saved or not by this statute is a question which the Court reserves for future consideration. It is a fact that one of the contracting parties resided in the State of Washington and that the home office of this defendant company is in New York, and that the transactions between them by which a contract was finally consummated, was partly in the State of Washington and part-

ly in the State of New York, and because of the transactions being thus partly in one State and partly in another, there is a question in the case whether the law of New York, by reason of its own force, did have any controlling effect in the case; and the parties have, in the contract itself, made certain stipulations which leave a question which has not yet been passed upon by the supreme court of the United States in this case, or any other case, and that question as to the effect of the stipulation of the parties in this contract, is one which the Court reserves for future consideration.

"Now, the Court assumes, in submitting the case to you, that the rights of the plaintiffs are saved by the New York statute, unless the contract has been abrogated by the conduct of the plaintiffs since the policy was issued.

"One of the defenses set up in the defendant's answer is, that these plaintiffs neglected and refused to pay the premiums. A refusal on their part would constitute a complete bar of their right to recover in this case. If they have refused to pay the premium then that amounts to a complete abrogation of the contract itself.

"Now, a refusal implies an affirmative act with knowledge and with an opportunity to act. It is not synonymous with omission. A mere omission to pay the premium has no such effect, but the defense that is interposed here is that these plaintiffs with knowledge that the premiums were due and were unpaid refused to pay them, and that is the question which I submit for you

to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiffs in this case as would amount to a refusal to pay the premiums or whether there was any express contract or agreement since the delivery of the policy, which amounts to an agreement on their part to surrender the policy or abrogate the contract.

"There is another question which I submit to the jury, and that is whether Captain Hill himself, whose life was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or trustee of the plaintiffs and his act would not be an equivalent to their act, but the contract was made by him; and his failure to pay the premium, if it was known to the plaintiffs and was acquiesced in by them and ratified by them, would be an abrogation of the contract. His act, not especially authorized or ratified would not have that effect.

"If you find from the evidence that there was any affirmative act on the part of these plaintiffs or any act of their father that was approved and ratified by them, which abrogated this contract in any way, your verdict will be for the defendant. If there was no such subsequent abrogation of the contract your verdict will be for the plaintiff and you will return a verdict in favor of the plaintiffs in the sum of $29,020.

"I submit to you two forms of verdict. Whichever conforms to your decision in the case will be signed by your foreman and brought into court as your verdict in the case.

"You may retire, gentlemen."

(Before the retirement of the jury the defendant took the foregoing exceptions to the refusal of the Court to give instructions requested by the defendant and to each of the foregoing instructions given by the Court.)

After being instructed the jury retired and afterwards returned with a verdict in favor of the plaintiffs for the sum of $29,020.00 (twenty-nine thousand and twenty dollars).

The foregoing constitutes the testimony and a statement of all the evidence introduced and offered upon the trial of this cause, and of all the proceedings upon said trial from the coming of the jury to the rendition of the verdict.

And now in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and prays that the same may be settled and allowed and signed and certified by the Judge, as provided by law.

R. C. STRUDWICK and
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

It is stipulated, that the foregoing bill of exceptions presented by defendant, contains the testimony, and a statement of all of the evidence introduced and offered upon the trial of said cause, and of all the proceedings had upon said trial, from the coming of the jury to the rendition of judgment therein and that the same is satisfactory in form and may be settled and allowed, and signed and certified by the Judge of said Court, as provided by law.

It is further stipulated that the original exhibit "A," being the application, shall be transmitted with and form a part of this bill of exceptions, without being physically attached to it.

Dated February 25th, 1902.

STRUVE, ALLEN, HUGHES & McMICKEN, and
R. C. STRUDWICK,

Attorneys for Plaintiffs.

STANTON WARBURTON, and
PRESTON, CARR & GILMAN,

Attorneys for Defendant.

The foregoing bill of exceptions, containing the testimony and a statement of all the evidence introduced and offered upon the trial of said cause, and of all the proceedings had therein from the coming of the jury to the rendition of the judgment, and being by the stipulation of the parties agreed to as a true and correct bill of exceptions, is hereby approved allowed, and settled, and made a part of the record herein.

Dated this 25th day of February, 1902, the January, 1902, term and done in open court.

C. H. HANFORD,
Judge.

[Endorsed]: Bill of Exceptions. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Petition for Writ of Error.

The Mutual Life Insurance Company of New York, a corporation, defendant in the above-entitled action, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 30th day of January, 1902, in said cause, comes now by Messrs. Struve, Allen, Hughes & McMicken and R. C. Strudwick, Esq., its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order may be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and

stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

R. C. STRUDWICK,
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant.

Due service of the foregoing petition acknowledged at Seattle Washington, the 25th day of February, 1902.

S. WARBURTON and
PRESTON, CARR & GILMAN,
Attorneys for Plaintiffs.

[Endorsed]: Petition for Writ of Error. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Assignment of Errors.

Comes now the above-named defendant, and feeling itself aggrieved by the judgment entered in this cause against it, and in favor of said plaintiffs, and being desirous of having sued out a writ of error to the Circuit Court of Appeals, and being about to petition for the issuance of such writ of error, files the following assignment of errors upon which it will rely for the reversal of said judgment.

I.

That the United States Circuit Court in and for the District of Washington, Northern Division, erred in denying the motion of the defendant after plaintiff and de-

fendant had rested their respective cases and before argument to the jury that the Court direct the jury to return a verdict in favor of the defendant.

II.

That the said trial court erred in denying the motion of defendant (made after plaintiff and defendant had rested their cases and before argument to the jury) that the Court direct the jury to return a verdict for the defendant upon the ground that the contract of insurance sued upon was delivered in, and the first annual premium thereon paid, in the State of Washington, and was a Washington contract; and that no other premium was paid after the delivery of the policy and during the lifetime of the insured, George Dana Hill, because it was admitted and stipulated that the insured, George Dana Hill, resided and had his postoffice address at Seattle, Washington, from the date of the policy in April, 1886, to his death in December, 1890, and had no postoffice address in the State of New York, because the policy introduced in evidence provides that no notice whatsoever as to the due-date of premiums shall be required or given other than the mention of the date of payment fixed in the policy, and that upon failure to pay as in the policy provided, the contract of insurance becomes void; because it was shown by uncontradicted testimony that when the second annual premium of April 29, 1887, became due upon the policy sued upon, the agent of defendant being in possession of the renewal receipt, personally applied to the insured George Dana Hill to make

payment of the premium, and though frequently requested so to do the said Hill failed, neglected and refused to make payment and permitted and allowed the said policy to lapse and become terminated; and because defendant had acted upon the said conduct of Hill and treated the policy of insurance as terminated after April 29, 1887, because it is admitted in the pleadings that each and all of the plaintiffs have failed and omitted to make payment of any premium upon said policy; because notice and demand of payment of premium and neglect, failure and refusal on the part of George Dana Hill is notice and demand upon the plaintiffs, and his neglect, failure, and refusal to pay was that of plaintiff; because it is alleged and proven that defendant is a mutual life insurance company and the plaintiffs without paying or offering to pay, have neither paid nor offered to pay any of the defaulted premiums for the years 1887, 1888, 1889 and 1890; because plaintiffs under their pleadings claimed performance of the terms and conditions of the policy upon their part, and that of the insured, and failed to show compliance in the payment of premiums, but on the contrary the evidence is undisputed that but one premium was paid upon said policy. Because of the total variance between the case pleaded by plaintiffs and the proofs and the entire want of proof to sustain plaintiff's case. Because the statute of New York has no application to the case as made, and has reference to the forfeiture of premiums already paid upon policies and the advantages accruing therefrom, and not to the nonpayment of premiums.

III.

Error of the Court in refusing to give the jury the following instruction requested by defendant plaintiff in error:

"The Court instructs the jury as a matter of fact that the contract of insurance sued on did not become an existing contract until it was delivered to the insured George D. Hill at Seattle, Washington, when and where the first annual premium was paid, but it was, at the time when this contract came into being, agreed by and between the parties that it should be construed to be made in New York City, but it was at the same time agreed between the contracting parties, that no statute, whether of New York or elsewhere, should require any notice to be given of when any premium on the policy fell due, but that the policy itself afforded the notice and all the notice of the date at which the premium fell due, to wit, on the 29th day of April, 1887, and the same day of each succeeding year during the continuance of the policy, and if not so paid the policy should terminate and become void. It is denied by the answer that any part of the premium falling due April 29th, 1887, was ever paid. If this premium was not paid then the policy became forfeited and ended, and the plaintiffs have no right to recover. The Court instructs you there is no evidence before you that this premium falling due April 29th, 1887, or any part of it, or any subsequent premium, was ever paid, but on the contrary the evidence is that such premium was not paid."

IV.

The Court erred in refusing to give to the jury the following instruction requested by defendant, plaintiff in error:

"The plaintiffs in this case admit that aside from the first premium paid in 1886 upon the delivery of the policy, none of them have ever paid any premium upon this policy. The answer denies that any premium save the first upon the delivery of the policy was ever paid by anyone. The Court instructs you there is no evidence in the case tending to show that any premium, save the first annual premium paid upon the delivery of the policy, ever has been paid; while on the contrary there is evidence tending to show that no such premium ever has been paid, and upon this state of facts you should render a verdict in favor of the defendant."

V.

The Court erred in refusing to give the jury the following instruction requested by defendant, plaintiff in error:

"The Court instructs you that there is no evidence in this case tending to show that the insured George D. Hill, at any time from the time of making his application for the policy sued on in April, 1886, to his death, December 4, 1890, had any postoffice address in the State of New York, but on the contrary it is stipulated and agreed by the parties that during all of that time his postoffice address was at the city of Seattle in the State of Washington. The Court instructs you as a matter of law that the defendant was not required by any statute of the State of New York, or elsewhere, to serve a notice

of the date when the premium became due upon the insured George D. Hill, except he had a postoffice address in the State of New York, and as the Court has advised you, there is no evidence that he had a postoffice address in the State of New York or elsewhere save in the city of Seattle, State of Washington."

VI.

The Court erred in refusing to give the jury the following instruction requested by defendant, plaintiff in error:

"The Court instructs you that if the insured George D. Hill failed to pay the premiums upon the policy sued upon, falling due on the 29th day of April, 1887, the 29th day of April 1888, the 29th day of April, 1889, and the 29th day of April, 1890, then he abandoned the contract and the same became terminated, and there would be no right on the part of these plaintiffs to recover, and your verdict in such case should be in favor of the defendant. The Court instructs you that there is no evidence tending to show that said George D. Hill, or anyone, paid any of the premiums for any or all of these four years, but there is evidence tending to show that he did not, and that such premiums were not paid."

VIII.

The Court erred in refusing to give the following instruction to the jury requested by defendant, plaintiff in error:

"The Court instructs you that the plaintiffs in this case rely for their recovery upon a performance of the

conditions on their part or that of the insured, as the ground of their right to recover, and that one of the conditions upon which such right of recovery rests is that the premiums falling due on the 29th day of April, 1887, and on that day of each succeeding year during the life of said Hill, which ended December 4, 1890, were paid. The Court further instructs you that there is no evidence whatever tending to show that any of said premiums were ever paid, or caused to be paid, and under the case as made by plaintiffs, recovery cannot be had for failure on the part of the Insurance Company to comply with any statute of the State of New York relative to giving notice as to when the premium or premiums fell due. To allow the plaintiffs to recover because of failure to give notice under the statute of New York, would be what in law is termed a departure in pleading which cannot be permitted. Va. The Court instructs you that in matters relating to the payment of premiums upon this policy the insured George D. Hill was the agent or trustee of the plaintiffs, with full power to bind them in that respect, and any failure, omission or act on his part to make payment of a premium or premiums as the same became due, became their failure, omission or act."

VIII.

The Court erred in refusing to give to the jury the following instruction requested by defendant, plaintiff in error:

"The Court instructs you that the defendant in this case is a Mutual Life Insurance Company or Association, whose membership consists of what in law is known as

its 'persistent policy holders,' that is, the policy holders of the company keeping up their policies by the payment of premiums as falling due and if you find that the premiums on the policy in suit falling due April 29, 1887, 1888, 1889 and 1890, were not paid and have not been paid, and the Court further instructs you that there is no evidence that any of the same have been paid, then the Court instructs you that your verdict should be in favor of the defendant."

IX.

The Court erred in refusing to give to the jury the following instruction requested by defendant, plaintiff in error:

"The Court instructs you there is no statute of New York, nor any law, requiring or directing the defendant insurance company to give any notice to any of the plaintiffs in this case as to when any premium upon the policy sued upon became due. Plaintiffs had the right, however, by virtue of their interest in the policy, to have paid any premium at the time it fell due, and the defendant would have been bound to accept it. It would have been the duty of the plaintiffs, or any of them, to have made tender of the amount of the premium at the time it fell due, to the company or some of its authorized agents. There is no proof, however, that any such tender was made, but, on the contrary, the pleadings admit that none of the plaintiffs ever did pay or cause to be paid any such premium."

X.

The Court erred in refusing to give to the jury the following instruction requested by defendant, plaintiff in error:

"Upon all the evidence in the case, gentlemen of the jury, the Court instructs you to find a verdict in favor of the defendant."

XI.

The Court erred in giving the following instruction during the course of its charge to the jury:

"Now, a refusal implies an affirmative act, with knowledge and with an opportunity to act. It is not synonymous with omission. A mere omission to pay the premiums has no such effect, but the defense that is interposed here is that these plaintiffs, with knowledge that the premiums were due and were unpaid, refused to pay them, and that is the question which I submit for you to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiffs in this case as would amount to a refusal to pay the premiums, or whether there was any expressed contract or agreement since the delivery of the policy which amounts to an agreement on their part to surrender the policy or abrogate the contract."

XII.

The Court erred in giving the following instruction in its charge to the jury:

"There is another question which I submit to the jury, and that is, whether Captain Hill himself, whose life was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or the trustee of the plaintiffs, and his act would not be an equivalent to their act, but the contract was made by him, and his failure to pay the premium, if it was known to the plaintiffs, and was acquiesced in by them, and ratified by them, would be an abrogation of the contract. His act, not especially authorized or ratified, would not have that effect."

XIII.

The Court erred in giving the following instruction in its charge to the jury:

"If you find from the evidence that there was any affirmative act on the part of these plaintiffs, or any act of their father, that was approved and ratified by them, which abrogated this contract in any way, your verdict would be for the defendant. If there was no such subsequent abrogation of the contract, your verdict would be for the plaintiff in the sum of twenty-nine thousand and twenty dollars."

XIV.

The Court erred in overruling the motion of defendant and plaintiff in error for a new trial, on the ground that the said verdict was contrary to law, was not supported by the evidence, and on account of the erroneous instruc-

tions given by the Court to the jury, and the failure to give instructions requested by defendant and plaintiff in error.

XV.

Error committed by the trial court in refusing to grant the motion of defendant and plaintiff in error for judgment in its favor dismissing said action, notwithstanding the verdict in favor of plaintiff.

XVI.

Error committed by the trial court in rendering judgment in favor of plaintiff and against defendant, appealed from, or in rendering any judgment in favor of plaintiffs.

R. C. STRUDWICK, and
STRUVE, ALLEN, HUGHES & McMICKEN,
Attorneys for Defendant and Plaintiff in Error.

Service of the foregoing assignment of errors acknowledged at Seattle, Washington, February 25th, 1902.

S. WARBURTON and
PRESTON, CARR & GILMAN,
Attorneys for Plaintiffs.

[Endorsed]: Assignment of Errors. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Order Allowing Writ of Error.

Upon motion of Messrs. Struve, Allen, Hughes & McMicken and R. C. Strudwick, Esq., attorneys for the defendant, and upon filing a petition for a writ of error and an assignment of errors, it is

Ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, a judgment heretofore made and entered herein, and that the amount of bond on said writ of error be and hereby is fixed at thirty-five thousand dollars; and that upon the execution and approval of said bond, a supersedeas be allowed.

C. H. HANFORD,

United States District Judge, and One of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Presiding at the Court for the District of Washington.

[Endorsed]: Order Allowing Writ of Error. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,

Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

No. 511.

Supersedeas Bond.

Know all men by these presents, that The Mutual Life Insurance Company of New York, a corporation, defendant above named, as principal, and Jacob Furth and J. S. Goldsmith as sureties, are held and firmly bound unto the above-named plaintiffs, Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by his guardian ad litem, Eben Smith, and each of them, in the full and just sum of thirty-five thousand dollars ($35,000.00), to be paid to the said above-named plaintiffs, and each of them,

his, her, or their executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives, heirs, executors or administrators, jointly and separately, firmly by these presents.

Sealed with our seals and dated this 25th day of February, 1902.

Whereas, lately at a session of the Circuit Court of the United States for the District of Washington, Northern Division, in a suit pending in said court between said plaintiffs and the said defendant, a final judgment was rendered against the said defendant and in favor of said plaintiffs, and the said defendant, The Mutual Life Insurance Company of New York having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said plaintiffs is about to be issued, citing and admonishing them, and each of them, to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California.

And now, the condition of the above obligation is such that if the said The Mutual Life Insurance Company of New York shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it (including therein all just damages for delay, cost and interest on appeal, if it shall fail to make its ap-

peal good), then the above obligation to be void; otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

By JOHN B. ALLEN,

Its Attorney, and

SHERWOOD GILLESPY, [Seal]

Its Agent.

JACOB FURTH. [Seal]

J. S. GOLDSMITH. [Seal]

The within bond, and the sufficiency of the sureties therein, is hereby approved this 25th day of February, 1902.

C. H. HANFORD,

Judge.

No objection to form of bond or sufficiency of sureties.

S. WARBURTON, and

PRESTON, CARR & GILMAN,

Attorneys for Defendants in Error.

State of Washington, }
County of King. } ss.

Jacob Furth and J. S. Goldsmith, being severally sworn, says: He is a citizen, resident, and householder in said State and county, and one of the sureties on the foregoing supersedeas bond, and is worth the sum of twenty thousand dollars over and above his debts and liabilities, exclusive of property exempt from execution.

JACOB FURTH.

J. S. GOLDSMITH.

Subscribed and sworn to before me this 25th day of February, 1902.

[Notarial Seal] H. J. RAMSEY,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Supersedeas Bond. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, EBEN SMITH,
Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

Clerk's Certificate to Transcript.

United States of America,
District of Washington. } ss.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the District of Washington, do hereby

certify the foregoing one hundred and fifty-nine (159) typewritten pages, numbered from 1 to 159, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is the sum of $56.30, and that said amount has been paid to me by Struve, Allen, Hughes & McMicken, attorneys for plaintiff in error, The Mutual Life Insurance Company of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court, this 18th day of March, 1902.

[Seal.] A. REEVES AYRES,

Clerk United States Circuit Court, District of Washington,

By R. M. Hopkins,

Deputy Clerk of said Court.

Writ of Error.

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable, the Judges of the Circuit Court of the United States, for the District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said

Circuit Court before you, or some of you, between The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, and Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill by his guardian ad litem Eben Smith, defendants in error, a manifest error hath happened to the damage of the said The Mutual Life Insurance Company of New York, a corporation, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so as to have the same at said place in said Circuit Court not exceeding thirty days from the date of the signing of the citation herein, to wit, not exceeding thirty days from the 25th day of February, 1902. That the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 25th

day of February, in the year of our Lord one thousand nine hundred and two.

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit Court, District of Washington, Northern Division.

By R. M. Hopkins,
Deputy.

Allowed by:
[Seal]

C. H. HANFORD,
District Judge.

Service of the foregoing writ of error and receipt of a copy thereof is hereby admitted at Seattle, Washington, this 25th day of February, 1902.

S. WARBURTON and
PRESTON, CARR & GILMAN,
Attorneys for Defendants in Error and Plaintiffs in the Lower Court.

Received this 25th day of February, 1902, a true copy of the foregoing writ of error for said defendants in error.

[Seal] A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Ninth Circuit, District of Washington, Northern Division.

By R. M. Hopkins,
Deputy Clerk.

[Endorsed]: Original. No. 511. In the United States Circuit Court, District of Washington, Northern Division. Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and

Eugene C. Hill, by His Guardian ad Litem, Plaintiffs, vs. The Mutual Life Insurance Company of New York, Defendant. Writ of Error. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

Citation.

UNITED STATES OF AMERICA.

The President of the United States, to Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by His Guardian ad Litem, Eben Smith, and to Each of Them, and to Messrs. Preston, Carr & Gilman, and S. Warburton, Their Attorneys:

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco in the State of California, within thirty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Washington, Northern Division, wherein the Mutual Life Insurance Company of New York is plaintiff in error and you are defendants in error, to show cause, if any there be why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States

of America, this 25th day of February, 1902, and of the Independence of the United States the one hundred and twenty-sixth.

C. H. HANFORD,

United States District Judge, presiding in the Circuit Court.

Attest:

[Seal] A. REEVES AYRES,

Clerk.

By R. M. Hopkins,

Deputy.

Due service of the foregoing citation acknowledged at Seattle, Washington, February 25th, 1902.

S. WARBURTON and

PRESTON, CARR & GILMAN,

Attorneys for Defendants in Error and Plaintiffs below.

[Endorsed]: Original. No. 511. In the United States Circuit Court, District of Washington, Northern Division. Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by His Guardian ad Litem, Plaintiffs, vs. The Mutual Life Insurance Company of New York, Defendant. Citation. Filed in the United States Circuit Court, District of Washington. February 25, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

[Endorsed]: No. 813. In the United States Circuit Court of Appeals for the Ninth Circuit. The Mutual Life Insurance Company of New York, Plaintiff in Error, vs. Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by His Guardian ad Litem, Eben Smith, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Washington, Northern Division.

Filed March 22, 1902.

F. D. MONCKTON,

Clerk.

15480

PROCEEDINGS

HAD IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term A. D. 1901, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the city and county of San Francisco, on Wednesday, the fourteenth day of May, in the year of our Lord one thousand nine hundred and two. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ELIZA MAUD HILL et al.,
Defendants in Error.
No. 813.

Order of Submission.

Ordered cause argued by E. S. Pillsbury and John B. Allen, Esquires, counsel for the plaintiff in error, and Stanton Warburton, Esquire, counsel for the defendants in error, and submitted to the Court for consideration and decision, with leave to Mr. Pillsbury to print and file his argument within twenty (20) days from date.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and EUGENE C. HILL, by His Guardian ad Litem, Eben Smith,
Defendants in Error.
No. 813.

Opinion of United States Circuit Court of Appeals.

This is an action to recover the amount of a life insurance policy, brought by the defendants in error, as beneficiaries under said policy, against the plaintiff in error, the company issuing the policy.

The case is before this Court for the second time, having been removed to the Supreme Court of the United States after the first hearing, upon certiorari, and by that Court certified back to the Circuit Court of the United States for the District of Washington, with a mandate for further proceedings. Upon such proceedings being had, an appeal was again taken to this court.

On April 29, 1886, the plaintiff in error issued its policy of insurance upon the life of George Dana Hill, in the sum of $20,000, in favor of his wife, Ellen Kellogg Hill, if she were living at the time of his death, or in case of her death, to the children of their bodies who should be living at the time of the death of the insured. The first annual premium, amounting to $814, was paid by the insured upon delivery of the policy to him at Seattle, Washington, to the agent of the insurance company at that place. The wife died in February, 1887, and the insured died on December 4, 1890. No further premiums were paid upon the policy after the first annual preimum. It appears from the evidence that when the next annual premium became due the Seattle agent of the insurance company called upon Hill for payment of the same, presenting a renewal receipt duly executed by the head officials of the company; that Hill did not pay the premium, and after repeated opportunities for payment having been given and not availed of, the agent at Seattle returned the renewal receipt to the general office of the company at San Francisco; that the head of the latter office, out of special interest in the case, returned the renewal receipt to the agent at Seattle, and it was again presented to Hill and payment requested; that Hill failed and declined to make payment, and the renewal receipt was returned to San Francisco and thence to the home office in New York, where the policy was noted as lapsed and terminated. No offer or tender of payment of premium was later made by anyone upon the policy. Upon the death of Hill the

defendants in error, children of the said Hill and his wife and named as beneficiaries in the policy, furnished proper proof of the death of the said Hill, and demanded of the plaintiff in error the payment of the amount of the policy. In support of their claim the defendants in error contended that the insured was not in default in the payment of premiums on said policy until a notice had been mailed to him pursuant to the statute of New York requiring notices to be given by insurance companies transacting business in that State; that according to the agreement contained in the application for insurance and contract of insurance the terms of said contract were to be performed in New York, and all questions as to the validity of the provisions of said contract, and as to the rights and liabilities of the parties thereto, must be determined in accordance with the laws of New York; that under such laws the plaintiff in error had no power to cancel the policy or claim a forfeiture without giving the statutory notice; that by reason of the failure to give such notice the premiums did not become due, and there was no default.

The plaintiff in error (defendant below) denied that the conditions of the contract of insurance had ever been performed by the insured, and contested the claim that the contract of insurance was to be performed in New York or was subject to the laws of New York. It contended that it was transacting its business in the State of Washington at the time of the issuance of the policy, having its principal office in Seattle in said State; that the insured was at that time a citizen

of Washington, residing therein; that he made application for insurance of the Seattle agent; that this application was transmitted to the agent of the company at San Francisco, and by him forwarded to the home office at New York; that pursuant to the application, the company issued the policy; sent it to the agent in San Francisco, who afterward transmitted it to the agent in Seattle; that the insured there paid the first premium, and received the policy. And in response to the contention that there was no default on the part of the insured, it was alleged that at a time more than one year from the time of the issuance of the policy it was mutually agreed between the insured and the insurance company that the said contract of insurance should be waived; abandoned, and rescinded. It was contended that this agreement was made up of the acts of the agent of the insurance company at Seattle in notifying the insured that the premium of $814 necessary to be paid upon said policy for its continuance was due and payable, and of the acts of the insured in informing said agent that he was unable to pay such premium, and intended to allow the policy to lapse and become forfeited for want of payment of said premium, or any future premium accruing on said policy; and it was alleged that the insurance company, in good faith relying upon said conduct and representations of the insured, was induced to, and did, fail and abstain from giving or mailing any notice to the insured, or to any person interested in said policy, concerning the payment of any premium thereon.

Demurrers to the answer were sustained, and upon the election of the plaintiff in error to stand upon its pleadings, a judgment was given upon the pleadings, in favor of the beneficiaries, for $24,086.61, with interest and costs. The Circuit Court of Appeals affirmed this judgment, holding that the contract of insurance must be considered as made in the State of New York and subject to the laws of the State. (97 Fed. 263, 267.)

Upon appeal to the Supreme Court of the United States that court held that the answer of the defendant disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy and all rights and obligations on the part of the parties thereto, and that upon the allegation of the insurance company that "each and all the plaintiffs (including the beneficiaries) neglected and refused to pay" the premium due on said policy, the beneficiaries were also parties to the abandonment of the policy, and had no rights remaining thereunder. The judgments of the Circuit Court of Appeals and if the Circuit Court were reversed, and the case remanded to the Circuit Court with instructions to overrule the demurrers to the answer of the insurance company. (178 U. S. 347.) In accordance with this mandate, the case was reinstated in the Circuit Court for the District of Washington, brought to trial and submitted to a jury for decision upon the question whether the insured himself abrogated the contract by any agreement on his part to surrender or avoid it, and if so, whether there was knowledge of such agreement by the beneficiaries, or whether there was any

act on the part of the beneficiaries amounting to a refusal to pay the premiums, or to surrender the policy or abrogate the contract. The jury found a verdict in favor of the beneficiaries in the sum of $29,020, and from that verdict the insurance company again brings the case to this court upon writ of error.

Julien T. Davies, E. S. Pillsbury, Edward Lyman Short, John B. Allen and Wm. H. Chickering, Attorneys for Plaintiff in Error.

S Warburton, Harold Preston, and Eben Smith, Attorneys for the Defendants in Error.

Before GILBERT, ROSS and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the Court.

The assignment of errors relate to the refusal of the Court to give certain instructions requested by the plaintiff in error, to the giving of other instructions by the Court, and to the refusal of the Court to grant a motion by the plaintiff in error for a judgment in its favor notwithstanding the verdict.

Upon the former hearing it was held by this Court that the policy of insurance in controversy was a New York contract, according to its terms, and that the Laws of New York of 1877, chapter 321, section 1, providing that no insurance company shall declare a policy forfeited for nonpayment of premiums without having first given the assured thirty days' notice that the premiums were due and that the policy would be forfeited if they

were not paid, were mandatory; also, that under such a policy the rights of the beneficiaries could not be affected by an attempted waiver of the statute by the assured, or by other than their own act and agreement. The judgment of this Court was reversed upon the ground that the answer of the defendant (plaintiff in error), alleged that the insured and the company had agreed to abandon and terminate the contract of insurance, and that the beneficiaries (plaintiffs below) "had failed, neglected and refused to pay the second premium," thus refusing to continue the policy. This allegation of the answer, it was said, "disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy and all rights and obligations on the part of the parties thereto." (Mutual Life Ins. Co. v. Hill, 178 U. S. 347, 350.) The case was sent back to the Circuit Court for trial on this question alone, the Supreme Court saying, in its opinion, that it was an interesting question how far the action of the insured could affect or bind the beneficiaries in a life insurance policy, but that under the allegations of the answer above stated it was unnecessary to examine that question. The plaintiffs (defendants in error) by their replication denied these allegations of the answer, and the case was brought to trial on the issues thus made. Upon the second trial it appeared by the testimony of each of the defendants in error, including the guardian, that not one of them had knowledge of the nonpayment of the premium, and that they had never refused to pay the same. The jury found a verdict for the plaintiffs (defendants in error), upon which judgment was entered.

This question of fact relating to the alleged abandonment of the contract on the part of the beneficiaries was thus disposed of in their favor.

The decision of this Court upon all other points not having been criticised or reversed by the Supreme Court, is now the law of the case for this Court. (Kankakee Coal Co. et al., Impleaded, vs. Crane Bros. Mfg. Co., 38 Ill. App. Ct. Rep. 555; Matthews vs. Bank, 100 Fed. 397; Texas & Pacific Ry. vs. Wilder, 101 Fed. 198.)

It is contended, however, that with respect to the opinion of this Court that the contract of insurance must be considered as having been made in the State of New York and subject to the laws of that State, this Court has in effect been reversed by the Supreme Court of the United States in the case of Mutual Life Ins. Co. vs. Cohen, 179 U. S. 262. Let us see if that is so.

The contract in the present case was made up of the application on the part of the insured and the policy issued by the company pursuant to the application, and the obligations of the respective parties are defined therein. The application contains the following clause: "It is agreed that * * * the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York." In the policy issued in compliance with this application appears the following statement: "In consideration of the application for this policy, which is hereby made a part of this contract, The Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill," etc. The con-

tract was thus by the express agreement of the parties made subject to the laws of New York, and governable by them. In the Cohen case the Supreme Court gave particular attention to the question of what law should control a contract of insurance made by the insurance company in New York with an individual in the State of Washington. The application in that case contained a stipulation that it (the application) was made subject to the charter of the company and the laws of the State of New York. It was held that while such a stipulation in the application is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled, a provision that the contract issued upon such application should, when made, be in all respects controlled by the laws of New York, incorporates those laws into the terms of the contract, and the contract is then controlled by such laws. Reference was made to the case of Baxter vs. Brooklyn Life Ins. Co., 119 N. Y. 450, as an example, where a stipulation appeared in the application for the policy that it was "a contract made and to be executed in the State of New York and construed only according to the laws of that State." The case was distinguished from the Cohen case because of the fact that the application in the Cohen case recited merely that the application was "subject to the charter of the company and the laws of the State of New York." This application was held to be but a preliminary instrument, containing such a stipulation in order to prevent a local suit as to the effect of statements or representations or any other matter in the application

from overriding the provisions of the charter and the laws of the State. No reference to the contract, when completed, was made in the application and it was held that under those conditions the laws of New York did not apply to the question of forfeiture. In the present case, however, the stipulation in the application is identical in substance with that appearing in the Baxter case (119 N. Y. 450), containing the agreement that the contract when made should be held and construed at all times and places to have been made in the city of New York. The policy issued was pursuant to that application, and the agreements contained in the application became a part of the completed contract. The decision of the Supreme Court in the Cohen case is not, therefore, a reversal of the decision of this court in the present case, but, on the contrary, it is clearly to be construed as in accord with our decision; and so construed, we must hold that the contract in the present case is controlled by the laws of the State of New York. By those laws no forfeiture could occur until the statutory notice had been given to the insured. This notice was not given, either to the insured or to the beneficiaries. Hence the policy was still in force at the time of the death of the insured, and the beneficiaries entitled to recover thereon.

Attention has been called to the decision of this court in the case of Mutual Life Ins. Co. vs. Hathway et al., 45 C. C. A. 655, 106 Fed. 815. It is only necessary to say that in that case the facts presented were identical with those in the Cohen case, the application containing the

same stipulation. The case was therefore governed by the decision of the Supreme Court in the Cohen case, and is clearly distinguished from the one now under consideration. Here the completed contract was made subject to the laws of New York; there the application merely was subject to the charter of the company and the laws of New York.

The action of the Court below appears to have been in accord with the law herein stated, and the judgment is therefore affirmed.

[Endorsed]: Opinion. Filed Oct. 6, 1902. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL and EUGENE C. HILL, by His Guardian ad Litem, Eben Smith,
Defendants in Error.
No. 813.

Judgment of U. S. Circuit Court of Appeals.

In error to the Circuit Court of the United States for the District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States

for the District of Washington, Northern Division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

[Endorsed]: Judgment. Filed and entered October 6, 1902. F. D. Monckton, Clerk.

At a stated term, to wit, the October term A. D. 1902, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the city and county of San Francisco, on Wednesday, the twelfth day of November, in the year of our Lord one thousand nine hundred and two. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ELIZA MAUD HILL et al.,
Defendants in Error.
No. 813.

Order Staying Mandate.

Upon motion of Warren Gregory, Esquire, on behalf of counsel for the plaintiff in error, ordered issuance of mandate herein stayed thirty (30) days from date.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL and EUGENE C. HILL, by His Guardian ad Litem, Eben Smith,
Defendants in Error.
No. 813.

Certificate of Clerk C. C. A. to Transcript.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and seven (207), pages, numbered from one (1) to two hundred and seven (207), inclusive, to be a true copy of the entire record in the above-entitled case in the said United States Circuit Court of Appeals for the Ninth Circuit as the same remains of record in my office.

Attest my hand and the seal of said United States Circuit Court of Appeals at San Francisco, California, this 19th day of November, A. D. 1902.

[Seal] F. D. MONCKTON,
Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Mutual Life Insurance Company of New York is plaintiff in error, and Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, by his guardian *ad litem*, Eben Smith, are defendants in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Washington, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of February, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] No. 813. C. C. A. File No. 18,746. Supreme Court of the United States. No. 518, October term, 1902. The Mutual Life Ins. Co., of New York, *vs.* Eliza Maud Hill *et al.* No. 813. United States circuit court of appeals for the ninth circuit Writ of certiorari. Filed March 20, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
vs.
ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and Eugene C. Hill, by His Guardian *ad Litem*, Eben Smith, Defendants in Error.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, acting by their respective attorneys of record, that the transcript of record in the above cause heretofore

certified by the clerk of the court of appeals and docketed in the Supreme Court of the United States as No. 518 on the calendar for the October term 1902 on petition for certiorari shall stand as the return by the circuit court of appeals to the writ of certiorari issued by the Supreme Court of the United States on the 28th day of February, A. D. 1903 in the above-entitled cause.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
E. S. PILLSBURY,
W. H. CHICKERING,
E. C. HUGHES,
Attorney- for Plaintiff in Error.
STANTON WARBURTON AND
HAROLD PRESTON,
Attorney- for Defendants in Error.

(Endorsed :) Stipulation as to return to writ of certiorari. Filed, March 20, 1903, F. D. Monckton, clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
v.
ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL, and Eugene C. Hill, by His Guardian *ad Litem*, Eben Smith, Defendants in Error.

Certificate of Clerk C. C. A. to Stipulation.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a true copy of a stipulation as to return to writ of certiorari filed in the above-entitled cause on March 20, 1903, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 21st day of March, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
v.
ELIZE MAUD HILL, GEORGE C. HILL, ELLEN KELLOGG Hill, and Eugene C. Hill, by his Guardian *ad Litem*, Eben Smith, Defendants in Error. } No. 813.

Certificate of Clerk Circuit Court of Appeals upon Return to Writ of Certiorari.

By direction of the honorable the judges of the United States circuit court of appeals for the ninth circuit I, Frank D. Monckton, clerk, in obedience to the annexed writ of certiorari issued out of the honorable the Supreme Court of the United States and addressed to the honorable the judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the above entitled cause, do attach to the said writ a certified copy of a stipulation entered into between the counsel for the respective parties to the said cause and filed on the 20th day of March, A. D. 1903, the original of which stipulation is of record in my office, and do hereby certify the same as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 21st day of March, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Endorsed:] File No. 18,746. Supreme Court U. S., October term, 1902. Term No. 518. The Mutual Life Insurance Co. of New York, pet'r, *vs.* Eliza Maud Hill *et al.* Writ of certiorari and return. Filed March 26", 1903.